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Supreme Court of the United States

OCTOBER TERM, 1960/63

No. [redacted] 62

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, ETC., PETITIONER,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1961
CERTIORARI GRANTED MARCH 20, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 688

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, ETC., PETITIONER,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1959

No. 26325

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK,
FRENCH AMERICAN BANKING CORPORATION,

and

THE ROYAL BANK OF CANADA, Petitioners-Appellants,
to quash three subpoenas duces tecum dated March 15, 1960.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

No. 26327

In the Matter of the Application of

NAPOLEON DUPOUY, Petitioner-Appellant,
to quash two subpoenas duces tecum dated March 15, 1960.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

On Appeal From the Order of the United States District Court for the Southern District of New York

Joint Appendix—Filed June 16, 1960

[fol. 1]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959

No. 26325

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION,

and

THE ROYAL BANK OF CANADA, Petitioners-Appellants,

to quash three subpoenas duces tecum dated March 15, 1960.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

No. 26327

In the Matter of the Application of

NAPOLEON DUPOUY, Petitioner-Appellant,

to quash two subpoenas duces tecum dated March 15, 1960.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

STATEMENT UNDER RULE 15(b)

The appeal in No. 26325 is by The First National City Bank of New York, French American Banking Corporation, and The Royal Bank of Canada (hereinafter collectively referred to as the "Banks"), and the appeal in No.

26327 is by Napoleon Dupouy, in both cases from an order of the United States District Court for the Southern District of New York (hereinafter referred to as the "District Court") entered on May 16, 1960. The respondent-appellee in both cases is Manuel Aristeguieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

[fol. 2] On March 15, 1960 respondent filed with the Clerk of the District Court the following: Notice of Deposition of The First National City Bank of New York, Notice of Deposition of French American Banking Corporation, and Notice of Deposition of The Royal Bank of Canada. On March 15, 1960 a subpoena duces tecum, returnable on April 18, 1960 before the District Court, was served on each of the Banks.

On April 8, 1960 the Banks commenced a proceeding to quash said subpoenas duces tecum by filing a notice and motion to quash, returnable on April 14, 1960, with the Clerk of the District Court. On April 13, 1960 respondent filed with the Clerk of the District Court an affidavit in opposition to the Banks' motion to quash.

On April 13, 1960 Napoleon Dupouy commenced a proceeding to quash the two subpoenas duces tecum served on The First National City Bank of New York and French American Banking Corporation by filing with the Clerk of the District Court an order to show cause, returnable on April 14, 1960.

The above-mentioned motions were heard by Chief Judge Ryan on April 14, 1960, and at that time he postponed the return date of said subpoenas duces tecum and requested briefs from the parties. An order continuing the time for taking depositions until May 10, 1960 was filed with the Clerk of the District Court on April 21, 1960.

On May 13, 1960 Chief Judge Ryan denied all motions to quash, and his opinion was filed with the Clerk of the District Court on that day. On May 16, 1960 an order was filed with the Clerk of the District Court which (i) denied the motions to quash of the Banks and Napoleon Dupouy; (ii) continued the taking of depositions until 10:00 A. M. on June 22, 1960; and (iii) denied motions by the Banks and

Napoleon Dupouy for stays pending the determination of these appeals.

The Banks filed their notice of appeal with the Clerk of the District Court on May 18, 1960. Napoleon Dupouy filed his notice of appeal with the Clerk of the District Court on May 19, 1960.

[fol. 3]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

NOTICE OF DEPOSITION OF THE FIRST NATIONAL CITY BANK OF NEW YORK

Please take notice that plaintiff demands that The First National City Bank of New York appear at 10:30 a. m. on April 18, 1960, at Room 601, United States Court House, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of George F. Nolte, Assistant Vice-President of The First National City Bank of New York, and of any other officer or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

(Subscription and affidavit of service omitted.)

(Filed in Clerk's Office, United States District Court for the Southern District of New York, on March 15, 1960.)

[fol. 4]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

NOTICE OF DEPOSITION OF FRENCH AMERICAN BANKING CORPORATION

Please take notice that plaintiff demands that French American Banking Corporation appear at 10:30 a. m. on April 18, 1960, at Room 601, United States Court House, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of Walter Anderson, Secretary of French American Banking Corporation, and of any other officer or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

(Subscription and affidavit of service omitted.)

(Filed in Clerk's Office, United States District Court for the Southern District of New York, on March 15, 1960.)

[fol. 5]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

NOTICE OF DEPOSITION OF THE ROYAL BANK OF CANADA

Please take notice that plaintiff demands that Royal Bank of Canada (New York Branch) appear at 10:30 a. m. on April 18, 1960, at Room 601, United States Court House, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of J. W. Ganaan, Agent of Royal Bank of Canada (New York Branch), and of any other officer or employee having knowledge of the facts,

pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

(Subscription and affidavit of service omitted.)

(Filed in Clerk's Office, United States District Court for the Southern District of New York, on March 15, 1960.)

[fol. 6]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

NOTICE OF DEPOSITION OF CHEMICAL BANK NEW YORK TRUST COMPANY

Please take notice that plaintiff demands that the Chemical Bank New York Trust Company appear at 10:30 a. m. on May 10, 1960, at Room 601, United States Court House, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of Raymond Adams, Treasurer of the Chemical Bank New York Trust Company, and of any other officer or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

(Subscription and affidavit of service omitted.)

(Filed in Clerk's Office, United States District Court for the Southern District of New York, on April 18, 1960.)

[fol. 7]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. M8-85

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK,
FRENCH AMERICAN BANKING CORPORATION,

and

THE ROYAL BANK OF CANADA,

to quash three subpoenas duces tecum dated March 15, 1960.

NOTICE AND MOTION TO QUASH SUBPOENAS DUCES TECUM

Take Notice that, upon the annexed affidavit of Melber Chambers, sworn to April 8, 1960, and the exhibits annexed thereto, the undersigned will move this Court at Room 506, United States Court House, Foley Square, New York City, on April 14, 1960, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order quashing three subpoenas duces tecum, copies of which are annexed hereto as Exhibits A, B and C, respectively, and which were served upon the above-named banks, as witnesses, on behalf of the demanding country in an extradition proceeding, on the grounds that:

(a) A District Court has no power to authorize or to issue subpoenas duces tecum on behalf of the demanding country in aid of an extradition proceeding, and

(b) A District Court may not permit or authorize the use of discovery proceedings on behalf of the demanding country in aid of an extradition proceeding,

and for such other and further relief as may be just.

(Date, subscription and direction omitted.)

(Filed in Clerk's Office, United States District Court for the Southern District of New York, on April 8, 1960.)

[fol. 8]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF MELBER CHAMBERS

State of New York,
County of New York.

Melber Chambers, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Sage Gray Todd & Sims, attorneys for The Royal Bank of Canada, one of the movants herein, and submit this affidavit in support of a motion to quash three subpoenas duces tecum which were served upon three banks in New York City on behalf of the demanding country in an extradition proceeding pending in Miami, Florida.

2. Movants, The First National City Bank of New York (hereinafter called "City Bank"), French American Banking Corporation (hereinafter called "French American") and The Royal Bank of Canada (hereinafter called "Royal Bank") were each served with a deposition subpoena duces tecum on or about March 15, 1960, signed in the name of Herbert A. Charlson, Esq., Clerk of the United States District Court for the Southern District of New York.

3. Each subpoena is addressed to one of the said banks and requires its appearance at the United States Court House, Foley Square, Manhattan, on April 18, 1960 and the production of records of bank accounts of 22 named persons and entities for the period March 14, 1949 to June 30, 1958. Such records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence. Copies of these subpoenas are annexed hereto as Exhibits A, B and C, respectively.

4. Each subpoena was issued on behalf of respondent, Manuel Aristeguieta (the diplomatic representative of the [fol. 9] demanding country in a proceeding for extradition brought under Section 3184 of Title 18, U. S. C., and the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 [1923]).

5. The extradition proceeding referred to in Paragraph 4 above was brought on or about August 24, 1959 by Manuel Aristeguieta, Consul General, on behalf of the Republic of Venezuela, seeking the extradition of Marcos Perez Jimenez, on the grounds of complicity in homicides, extortion, bribery, illicit enrichment, embezzlement and criminal malversation. Said extradition proceeding is pending at Miami, Florida, before The Honorable William C. Mathes, a United States District Judge.

6. On or about November 10, 1959 City Bank was served with a deposition subpoena duces tecum, substantially similar to Exhibit A. Upon motion of Marcos Perez Jimenez an order was entered on November 16, 1959 in the aforesaid extradition proceeding, directing that "the Notice of Taking Depositions . . . and all summonses connected therewith" be vacated. The order also provided that the extradition proceeding would be governed by the Federal Rules of Criminal Procedure and that the Federal Rules of Civil Procedure would not apply. A copy of such order is annexed hereto as Exhibit D.

7. On November 23, 1959 an order was entered vacating the order entered on November 16, 1959 in so far as it related to the establishment of special rules governing procedure. A copy of said order is annexed hereto as Exhibit E.

8. On or about December 2, 1959 each of the Banks was served in New York City with a subpoena duces tecum returnable in Miami before the District Court, and requiring the production of virtually the same documents and records sought under the current subpoenas (Exhibits A, [fol. 10] B and C). A copy of the subpoena served on City Bank on December 2, 1959 is annexed hereto as Exhibit F. The subpoenas served on the other two Banks are substantially identical with Exhibit F.

9. In support of his application for said subpoenas counsel for respondent said:

> "The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant.

It is expected that it will also disclose the method of the illegal concert of action between the defendant and others, as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant.

"In affiant's opinion it is essential that the requested subpoenas be issued in order that the full evidence may be produced and the interests of justice thereby served."

(affidavit of Sidney S. Sachs, sworn to November 25, 1959, pars. 7 and 8)

10. On December 4, 1959 the Banks moved in the District Court in Miami before Judge Mathes to quash the aforesaid subpoenas on the grounds that:

(a) A District Judge or a District Court lacks jurisdiction and power to issue a subpoena on behalf of the demanding country in an extradition proceeding;

(b) A District Judge or District Court has no jurisdiction or power to issue a subpoena commanding the appearance in Florida of witnesses served outside of that state and more than one hundred miles from the place of hearing; and

(c) Compliance with the subpoenas would be burdensome and oppressive.

[fol. 11] 11. On December 15, 1959 an order was entered denying the motion to quash and modifying the subpoenas in certain respects. A copy of the order is annexed hereto as Exhibit G.

12. Thereafter the Banks appealed to the United States Court of Appeals for the Fifth Circuit from the order of December 15, 1959 and applied in the alternative for a writ of prohibition or mandamus directing the District Judge to quash the subpoenas.

13. On February 1, 1960 the Court of Appeals reversed the District Court and directed that the order of December 15, 1959 be vacated and the subpoenas quashed. The Court

unanimously held that the order of December 15, 1959 was final and appealable, and a majority of the Court held that the subpoenas should be quashed. In view of the disposition of the appeal, the application for a writ of prohibition or mandamus was denied. A copy of the decision and mandate of the Court of Appeals, and of the order on mandate entered in the District Court, are annexed hereto as Exhibits H, I and J, respectively.

14. Respondent then moved that the Court of Appeals clarify its decision, and this motion was denied.

15. Thereafter respondent made a motion in the extradition proceeding for permission "to take the depositions, pursuant to subpoenas duces tecum" of certain officers of the Banks. In his motion respondent proposed "that such depositions be taken by issuance of notices of deposition and by service of subpoenas" and stated that the proposed subpoenas duces tecum would call for the production of the identical papers referred to in the subpoenas which had been quashed at the direction of the Court of Appeals.

16. Judge Mathes on March 9, 1960 entered an order in the extradition proceeding granting permission to re- [fol. 12] spondent to resort to the deposition procedure provided in Rule 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including the issuance of subpoenas duces tecum, to secure evidence from officials of the Banks in New York City. A copy of that order is annexed hereto as Exhibit K.

17. Thereafter the current subpoenas (Exhibits A, B and C) were served upon the Banks.

18. On or about March 16, 1960 the Banks petitioned the Court of Appeals for the Fifth Circuit for permission to file a petition for a writ of prohibition or mandamus directing Judge Mathes and the United States District Court for the Southern District of Florida, Miami Division, to vacate and set aside the order entered on March 9, 1960, and referred to in paragraph 16 above, and all proceedings taken pursuant thereto, and for other relief, on the ground that Judge Mathes had misconstrued the decision of the

Court of Appeals of February 1, 1960, referred to in paragraph 13, above, and failed to give effect to its mandate.

19. On March 25, 1960, the Court of Appeals denied the application without passing upon the propriety of Judge Mathes' order of March 9, 1960, or the validity of any subpoenas that might be issued pursuant thereto. A copy of the order of the Court of Appeals is annexed hereto as Exhibit L.

The Court of Appeals said:

> "The propriety of the action of the district court referred to in the proposed petition for writ of prohibition or mandamus was not before this Court nor decided by it and is not contrary to the mandate in No. 18176, decided January 29, 1960."

20. It is apparent from the foregoing that this is the third attempt by respondent to obtain the same information [fol. 13] and documentary evidence from the Banks. The first attempt, by a deposition subpoena duces tecum, was suppressed by the order of November 16, 1959 entered in the extradition proceeding (see paragraph 6 above). The second attempt, by subpoenas duces tecum, was forestalled by the decision of the Court of Appeals for the Fifth Circuit directing that the subpoenas duces tecum be quashed (see paragraph 13 above).

21. It is submitted that this Court has no power and is without jurisdiction to authorize or issue subpoenas on behalf of a demanding country in an extradition proceeding, since:

> (a) The jurisdiction of a District Court is created and limited by Congress, and there is no general or inherent power in a District Court to issue subpoenas;
>
> (b) The Federal Rules of Civil Procedure apply neither to an extradition proceeding nor to a purported proceeding in a United States District Court in aid of extradition;
>
> (c) The Federal Rules of Criminal Procedure apply neither to an extradition proceeding nor to a purported

proceeding in a United States District Court in aid of extradition;

(d) The "all writs" statute does not grant a District Court power to issue subpoenas in aid of extradition;

(e) The Treaty of Extradition between the United States and the Republic of Venezuela contains no provision authorizing the use by the demanding country of the discovery procedures of the courts of the asylum country;

(f) The statutes governing extradition are barren of any provision which authorizes the use by the demanding country of the discovery procedures of the United States courts, whether state or federal; and

[fol. 14] (g) There is nowhere any grant to a District Court of power to issue subpoenas in aid of extradition.

22. It is further submitted that the basic principle and purpose of extradition precludes the use of subpoenas or of discovery in any form to support the request of a demanding country. Extradition presupposes that the demanding country will come to the asylum country with *prima facie* proof of criminality. It is not expected; and no procedure is provided, to permit the demanding country to use the judicial apparatus of the asylum country to investigate or establish the proof of the commission of a crime.

23. It is further submitted that respondent seeks exactly that: to use the judicial apparatus of the United States, the asylum country to discover and assemble proof of the commission of crimes alleged to have been committed in Venezuela. Thus, counsel for respondent, in his answer to the motion of Marcos Perez Jimenez for a protective order, stated:

"There are compelling reasons for believing that the bank records that have been subpoenaed contain

important evidence of the crimes with which the defendant is charged.

• • • • • • •

"... [Defendant] deposited or had deposited for him or in any event received in his United States bank accounts approximately $4,400,000. Existing evidence will trace to its illegal sources about $500,000 of these deposits. The records of the banks to which the deposition subpoenas are directed will assist in tracing the balance to its sources, and there is every likelihood that these records will disclose significant additional deposits.

• • • • • • •

[fol. 15] "... It is true that plaintiff does not know, and indeed cannot know, all that will appear from examination of the subpoenaed bank records, but it is plain, as the foregoing recital demonstrates, that highly relevant evidence exists in the records of the banks pertaining to the accounts of the defendant and his family."

If the proof produced by the demanding country is sufficient to support the accusations and come within the Treaty, then the records called for by these subpoenas are unnecessary. Conversely, if the proof is deficient, then extradition must fail, and the deficiencies cannot be supplied by evidence, obtained by subpoenas in the United States, to show the commission of a crime in Venezuela.

(Sworn to by Melber Chambers on April 8, 1960.)

[fol. 16]

EXHIBIT A TO AFFIDAVIT OF MELBER CHAMBERS—SUBPOENA DUCES TECUM SERVED ON THE FIRST NATIONAL CITY BANK OF NEW YORK ON MARCH 15, 1960

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Civil Action File No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

To: THE FIRST NATIONAL CITY BANK OF NEW YORK by its Assistant Vice-President George F. Nolte and any other officer or employee having knowledge of the facts.

YOU ARE COMMANDED to appear at Room 601, United States Court House, Foley Square, Manhattan in the city of New York, N. Y. on the 18th day April, 1960, at 10:30 o'clock A. M. to testify on behalf of plaintiff at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of Florida, Miami Div. and bring with you the papers, documents and things set forth in the attached list marked Schedule A.

HERBERT A. CHARLSON,
Clerk.

Dated March 15, 1960.

By CATHERINE B. SALAMONE
Deputy Clerk.

HOWARD C. WESTWOOD
JOHN LOGAN O'DONNELL (Of Counsel)
Attorneys for Plaintiff
Address 701 Union Trust Building, Washington 5, D. C.
52 Vanderbilt Avenue, New York 17, N. Y.

(Return on service omitted.)

[fol. 17]

SCHEDULE A

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) in the amount of $1,000 or more drawn from March 14, 1949, to June 30, 1958, (inclusive) against each account maintained in French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) in the amount of $1,000 or more deposited or credited from March 14, 1949, to June 30, 1958, (inclusive) to each account maintained in French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, in the amount of $1,000 or more, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in French Ameri-
[fol. 18] can Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear,

and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Oscar Mazzei
Polinversiones, C. A.
Edificio Washington, C. A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 19]

EXHIBIT B TO AFFIDAVIT OF MELBER CHAMBERS—SUBPOENA DUCES TECUM SERVED ON FRENCH AMERICAN BANKING CORPORATION ON MARCH 15, 1960

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Civil Action File No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

To: FRENCH AMERICAN BANKING CORPORATION by its Secretary Walter Anderson and any other officer or employee having knowledge of the facts.

YOU ARE COMMANDED to appear at Room 601, United States Court House, Foley Square, Manhattan in the city of New York, N. Y. on the 18th day April, 1960, at 10:30 o'clock A. M. to testify on behalf of plaintiff at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of Florida, Miami Div. and bring with you the papers, documents and things set forth in the attached list marked Schedule A.

HERBERT A. CHARLSON.
Clerk.

Dated March 15, 1960.

By CATHERINE B. SALAMONE
Deputy Clerk.

HOWARD C. WESTWOOD
JOHN LOGAN O'DONNELL (Of Counsel)
Attorneys for Plaintiff
Address 701 Union Trust Building, Washington 5, D. C.
52 Vanderbilt Avenue, New York 17, N. Y.

(Return on service omitted.)

[fol. 20]

SCHEDULE A

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) in the amount of $1,000 or more drawn from March 14, 1949, to June 30, 1958, (inclusive) against each account maintained in The Royal Bank of Canada (New York Branch) ' name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) in the amount of $1,000 or more deposited or credited from March 14, 1949, to June 30, 1958 (inclusive) to each account maintained in The Royal Bank of Canada (New York Branch) in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in The Royal Bank of Canada (New York Branch) in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, in the amount of $1,000 or more, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in The Royal Bank of Canada (New York Branch) in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in The Royal Bank [fol. 21] of Canada (New York Branch) in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear,

and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Valenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Oscar Mazzei
Polinversiones, C. A.
Edificio Washington, C. A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 22]

EXHIBIT C TO AFFIDAVIT OF MELBER CHAMBERS—SUBPOENA DUCES TECUM SERVED ON THE ROYAL BANK OF CANADA ON MARCH 15, 1960

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Civil Action File No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

To: ROYAL BANK OF CANADA (NEW YORK BRANCH) by J. W. Ganaan, its Agent, and any other officer or employee having knowledge of the facts.

YOU ARE COMMANDED to appear at Room 601, United States Court House, Foley Square, Manhattan in the city of New York, N. Y. on the 18th day April, 1960, at 10:30 o'clock A. M. to testify on behalf of plaintiff at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of Florida, Miami Div. and bring with you the papers, documents and things set forth in the attached list marked Schedule A.

HERBERT A. CHARLSON,

Dated March 15, 1960. *Clerk.*

By CATHERINE B. SALAMONE

Deputy Clerk.

HOWARD C. WESTWOOD

JOHN LOGAN O'DONNELL (Of Counsel)

Attorneys for Plaintiff

Address 701 Union Trust Building, Washington 5, D. C.

52 Vanderbilt Avenue, New York 17, N. Y.

(Return on service omitted.)

[fol. 23]

SCHEDULE A

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) in the amount of $1,000 or more drawn from March 14, 1949, to June 30, 1958, (inclusive) against each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) in the amount of $1,000 or more deposited or credited from March 14, 1949, to June 30, 1958, (inclusive) to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, in the amount of $1,000 or more, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written [fol. 24] communications, and all records of any oral communications, from March 14, 1949, to June 30, 1958, (inclusive) with respect to each account maintained in the First National City Bank of New York (including its prede-

cessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Soi Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Oscar Mazzei
Polinversiones, C. A.
Edificio Washington, C. A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 25]

EXHIBIT D TO AFFIDAVIT OF MELBER CHAMBERS—ORDER OF JUDGE CHOATE, DATED NOVEMBER 13, 1959

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

Filed Miami, Fla.
Nov. 16, 1959
Julian A. Blake
Clerk

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THIS CAUSE having come on to be heard on motion of the defendant for a protective order, and the Court having heard the arguments of counsel and being duly advised in the premises, and it being the opinion of the Court that for counsels' guidance and in the interest of proper administration of justice in this cause and within the Court's discretion that fixed rules of procedure should be established for all matters relating to this cause and the Court being of the further opinion that the Federal Rules of Criminal Procedure are the most appropriate for the most part, as opposed to Federal Rules of Civil Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that as may relate to this particular cause all matters of procedure will be subject to the provisions of the Federal Rules of Criminal Procedure as they may apply and the Federal Rules of Civil Procedure will not apply, and it is further

[fol. 26] ORDERED, ADJUDGED and DECREED that the Notice of Taking Depositions of George F. Nolte, Assistant Vice-President of the First National City Bank of New York, and other unknown officers and employees of that bank, at 10:30 A. M., November 6, 1959, at New York, and all summonses connected therewith, be and the same are hereby vacated, the taking of testimony pursuant to said notice and summonses prohibited, and the parties concerned protected against failure of non-compliance therewith.

DONE AND ORDERED at Miami, Florida, this the 13th day of November, 1959.

/s/ EMETT C. CHOATE
Judge, United States District Court

[fol. 27]

EXHIBIT E TO AFFIDAVIT OF MELBER CHAMBERS—ORDER OF JUDGE CHOATE, DATED NOVEMBER 23, 1959

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

Filed Miami, Fla.
Nov. 23, 1959
Julian A. Blake
Clerk

[SAME TITLE]

THIS CAUSE coming on to be heard upon the Petition of the Plaintiff to amend the protective Order of November 13, 1959, and the pronouncements therein, and the Court being advised in the premises, the Court is of the opinion that the Order entered on November 13, 1959 ordering that the procedure for taking of depositions of witnesses in the United States as permitted under the Federal Rules of Civil Procedure should not apply and the procedure is

to be governed as stated in the Treaty. That the Court is of the opinion that the right of subpoena exists as relates to witnesses and further that the Court may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the Court. It is,

ORDERED, ADJUDGED AND DECREED that the Order of November 13, 1959 entered in the above cause, be and the same, is hereby vacated in so far as it relates to the establishment of special rules governing procedure in the above styled case.

DONE AND ORDERED in Chambers in the Federal Courthouse, Dade County, Florida, this 23rd day of November, 1959.

/s/ EMETT C. CHOATE
United States District Judge

[fol. 28]

EXHIBIT F TO AFFIDAVIT OF MELBER CHAMBERS—SUBPOENA DUCES TECUM SERVED ON THE FIRST NATIONAL CITY BANK OF NEW YORK ON DECEMBER 2, 1959

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

[SAME TITLE]

To: GEORGE F. NOLTE
Assistant Vice-President
The First National City
Bank of New York
55 Wall Street
New York, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant

to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N.E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; PROVIDED that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

[fol. 29] If counsel for the plaintiff or defendant take copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrara (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C. A.
Edificio Washington, C. A.

the contents of such copies shall not be disclosed by such counsel to any person other than the plaintiff or the defendant herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

.....

District Judge

(Return of service omitted.)

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

[fol. 30] 2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals of copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name

or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style [fol. 31] of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Appelwhite
Polinversiones, C. A.
Edificio Washington, C. A.

7. The foregoing paragraphs shall not require production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 32]

EXHIBIT G TO AFFIDAVIT OF MELBER CHAMBERS—ORDER OF JUDGE MATHES, DATED DECEMBER 15, 1959

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

[SAME TITLE]

This cause was continued from the hearing of November 23, 1959, as set forth in the order of this Court dated November 25, 1959. That order provided, among other things:

> "The plaintiff has presented this motion for an order of this Court permitting and directing the issuance of certain subpoenas, which said motion will be settled by this Court by separate order.
>
> It is further ordered that this cause and further proceedings herein shall be continued until 10 o'clock A.M. on December 14, 1959, at which time the defendant is hereby directed to be present in Court".

Pursuant to that order, this cause came on to be heard at 10 o'clock A.M. on December 14, 1959; the defendant and his counsel were present in court, and the plaintiff was represented in court by his counsel.

As stated in the aforesaid order of November 25, 1959, the plaintiff had submitted a motion for the issuance of certain subpoenas, and this Court, on November 25, 1959, entered a further order granting the said motion and issued subpoenas directed to the persons set forth in the affidavit attached to said motion, which persons were as follows:

> (a) George F. Nolte, Assistant Vice President, First National City Bank of New York (successor to

[fol. 33] National City Bank of New York), 55 Wall Street, New York City, N.Y.

(b) Walter Anderson, Secretary, French American Banking Corporation, 31 Nassau Street, New York City, N.Y.

(c) J. W. Ganann, Agent, Royal Bank of Canada (New York branch), 68 William Street, New York, N.Y.

(d) Isaac B. Grainger, President, Chemical Corn Exchange Bank, 165 Broadway, New York 15, N.Y.

(e) Wallace M. Davis, President, The Hibernia National Bank in New Orleans, Carondelet, Gravier and Union Street, New Orleans, La.

At the hearing on December 14, 1959, it appeared that service of the subpoenas had been effected, and on that day the subpoenas as served were filed with the Clerk of this Court, except as hereinafter noted.

From statements of counsel for the plaintiff, it appeared that when the subpoena was served upon Wallace M. Davis, the President of The Hibernia National Bank in New Orleans, counsel arranged with counsel for said Bank for the making of photostatic copies of records assembled by said Bank in response to the subpoena, and that such copies of said instruments were furnished to plaintiff's counsel and to defendant's counsel, thus obviating at this time the necessity for further return or further appearance by the said Wallace M. Davis without prejudice to the rights of either party to this cause to request additional information by additional subpoenas or orders of this Court upon further application. The further provisions of this order, therefore, do not apply with respect to the subpoena directed to the said Wallace M. Davis.

[fol. 34] In the interim between November 25, 1959, and December 14, 1959, certain motions were filed as follows:

A motion was filed on behalf of the defendant by his counsel David W. Walters, to quash or modify all of the aforesaid subpoenas.

A motion was filed by the firm of Fowler, White, Gillen, Humkey and Trenam as attorneys for the First National City Bank of New York, for the French American Banking Corporation, and for the Royal Bank of Canada, to quash the subpoenas respectively served upon officers of the said respective Banks.

A motion was filed by the firm of Smathers, Thompson and Dyer as attorneys for Silvio Gutierrez as a depositor in the Chemical Corn Exchange Bank to quash the portion of the subpoena directed to an officer of said Bank pertaining to his account or accounts with said Bank.

A motion was filed by Scott, McCarthy, Preston, Steel and Gilleland as attorneys for Napoleon Dupouy, a depositor in the French American Banking Corporation and in the First National Bank of New York to quash the subpoenas directed to officers of such Banks, insofar as they pertain to him.

In the course of the hearing of December 14, 1959, the defendant through his counsel also filed an additional motion to discharge the defendant from custody and to dismiss the proceedings.

There were present at the hearing of December 14, 1959, counsel for the First National City Bank of New York, for the French American Banking Corporation, and for the Royal Bank of Canada, counsel for Silvio Gutierrez and counsel for Napoleon Dupouy. There was also present a representative of Chemical Corn Exchange Bank; he advised the Court that the name of such Bank is now Chemical Bank New York Trust Company.

After hearing extensive argument of all counsel and being duly advised in the premises,

[fol. 35] IT IS ORDERED, ADJUDGED and DECREED as follows:

1. The respective motions to quash the subpoenas be and the same are hereby severally denied.

2. The defendant's motion was in the alternative either to quash the subpoenas or to grant modification, and after due consideration, including consideration of the suggestions or comments of various counsel and those of the representative of the Chemical Corn Exchange Bank (now Chemical Bank New York Trust), the Court has determined

that some modification would be advisable; therefore the subpoenas as issued shall be and hereby are modified in the following particulars:

(a) The documents evidencing deposits or withdrawals in the accounts of the various persons specified in the subpoenas which are called for by the subpoenas are limited to deposits or withdrawals of $1,000 or more in United States currency or its equivalent.

(b) The period set forth in the subpoenas, which was from March 14, 1949, to and including November 25, 1959, is amended to the period from March 14, 1949, to and including ~~December 31~~, June 30, 1958. Mathes D.J.

(c) The return date of the subpoenas is changed from December 14, 1959, to 10 o'clock A.M. on January 4, 1960.

3. The defendant's motion to be discharged from custody and to dismiss the proceedings, be and the same is hereby denied, without prejudice.

4. Since this modification of the subpoenas has been announced in open Court and all parties concerned were represented before the Court, these modifications of the subpoenas shall stand as the order of this Court without further necessity of personal service, and the parties con- [fol. 36] cerned shall take notice forthwith of the contents of this order, but counsel for the plaintiff shall serve a copy of this order by mail upon each of the parties upon whom the subpoenas were served, and upon counsel for the individual depositors who have filed their separate motion herein.

5. In the examination of their records and the preparation of information or copies of the same, the said Banks may incur unusual expenses which would not be covered by the usual witness fees as usually allowed in transactions of this type. If so any of such Banks claiming such unusual expenses may file a motion with this Court setting forth a complete statement of their time and services rendered and

the expense thereof, and, unless such expenses can be stipulated to and paid by plaintiff, this Court reserves the right, upon appropriate notice and hearing to fix a reasonable amount for the reimbursement of said expenses.

6. All proceedings in this cause shall be continued until 10 o'clock A.M. January 4, 1960, at which time the defendant shall present himself in open Court.

.....
UNITED STATES DISTRICT JUDGE

December 15, 1959.

[fol. 37]

EXHIBIT H TO AFFIDAVIT OF MELBER CHAMBERS—DECISION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN No. 18176

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCO PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C. A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

[fol. 38]

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

MANUEL ARISTEGUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

and

MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF PROHIBITION OR MANDAMUS

(February 1, 1960.)

[fol. 39] Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges

PER CURIAM: The appeal of the First National Bank of New York, the French American Banking Corporation, and the Royal Bank of Canada from an order denying a motion to quash three subpoenas duces tecum, issued on behalf of the demanding country in the extradition proceedings first hereinabove styled, and the motions for leave to file petitions for writ of prohibition or mandamus in all the other captioned causes, were argued and heard together. It was stipulated upon oral argument that final judgment might be entered as if leave to file the petitions for writ of prohibition or mandamus had been granted and those cases had been heard on the merits.

The court has carefully read and considered the briefs together with the oral arguments and has reached a conclusion. In view of the need for expedition, that conclusion is announced without opinion.

The court decides that the order denying motions to quash the subpoenas duces tecum is final and appealable. A majority of the court concludes that the said order should be reversed and the cause remanded with directions to quash the subpoenas duces tecum.

In view of the conclusions above announced, the petitions for the writ of prohibition or mandamus are denied.

The clerk is directed to enter judgments accordingly. Judge Rives thinks that the order should be affirmed, and, therefore, respectfully dissents.

[fol. 40]

EXHIBIT I TO AFFIDAVIT OF MELBER CHAMBERS—MANDATE OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN No. 18176

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[SAME TITLE]

Appeal from the United States District Court for the Southern District of Florida—and—Motions for Leave to File Petitions for Writs of Prohibition or Mandamus.

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court denying the motions to quash the subpoenas duces tecum in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to quash the subpoenas duces tecum; and that the petitions for writ of prohibition or mandamus are denied.

It is further ordered and adjudged that the appellants, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada recover their taxable costs in this Court from the appellee, Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

"Rives, Chief Judge, Dissenting."

January 29, 1960

Court Costs:

Docketing cause, etc. $25.00

March 3, 1960

[fol. 41]

EXHIBIT J TO AFFIDAVIT OF MELBER CHAMBERS—ORDER ON MANDATE, DATED MARCH 7, 1960

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

THIS CAUSE coming on to be heard by reason of defendant's motion for an order on the mandate of the United States Court of Appeals for the Fifth Circuit, in Case No. 18176, The First National City Bank of New York, et al., vs. Manuel Aristeguieta, etc., by the United States Court of Appeals for the Fifth Circuit, and issued by that Court on March 3, 1960, and the Court being fully informed in the premises, pursuant to the judgment of the United States Court of Appeals, dated February 1, 1960, remanding this cause with directions, it is hereby

ORDERED, ADJUDGED, and DECREED that the order of this Court heretofore issued, dismissing the various motions to quash the subpoenas duces tecum directed against:

George F. Nolte, Assistant Vice-President
First National City Bank of New York (successor to
[fol. 42] National City Bank of New York
55 Wall Street, New York City, New York

Walter Anderson, Secretary
French American Banking Corporation
31 Nassau Street, New York City, New York

J. W. Ganaan, Agent
Royal Bank of Canada (New York Branch)
68 William Street, New York City, New York

~~Isaac B. Grainger, President~~
~~Chemical Corn Exchange Bank~~
~~165 Broadway, New York 15, New York~~

[MATHES,
D.J.]

be, and the same is hereby, vacated, and the said subpoenas duces tecum be, and the same are hereby, quashed, pursuant to the direction of the Court of Appeals.

It is further DIRECTED and ORDERED that the Clerk of the Court determine, assess, and tax costs of the appeal against the plaintiff in accordance with the judgment of the Court of Appeals.

[MATHES,
D.J.]

DONE and ORDERED at Miami, Florida, this 7th day of March. A. D., 1960.

WM. C. MATHES
United States District Judge

[fol. 43]

EXHIBIT K TO AFFIDAVIT OF MELBER CHAMBERS—ORDER OF JUDGE MATHES, DATED MARCH 9, 1960

IN THE

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

[SAME TITLE]

ORDER GRANTING PERMISSION TO TAKE DEPOSITIONS

The plaintiff prior to March 7, 1960, filed in this Court a Motion for Permission to Take Depositions, accompanied by a certificate of service showing service by mail on February 25, 1960, on counsel for certain persons, includ-

ing the three banks referred to herein, who might be affected by such motion. After argument on March 7 and 8, 1960, by counsel for the plaintiff, in support of such Motion, and by counsel for the defendant, counsel for the First National City Bank of New York, French American Banking Corporation and Royal Bank of Canada, and counsel for certain depositors in such banks, in opposition to such Motion,

And the Court being of the opinion that the decision of the United States Court of Appeals for the Fifth Circuit in the case referred to in such Motion (No. 18176, order entered Feb. 1, 1960) was limited to the question before that Court, that is the question of the power of this Court to issue subpoenas, returnable before this Court in Miami, Florida, to be served upon persons in New York City more than 100 miles from Miami, Florida,

And the Court being of the further opinion that, under the Treaty and statutes here involved, procedure for the securing of evidence from persons unwilling to produce evidence voluntarily should be and is available in the manner provided in Rules 26 and 45, and related provisions of the Federal Rules of Civil Procedure, for the taking of depositions of witnesses pursuant to subpoenas, including subpoenas duces tecum, in accordance with the territorial limitations provided in such Rules,

[fol. 44] And the Court being of the further opinion that, in the particular circumstances of this case and in the light of the charges being made herein by the plaintiff, the proceedings held in this case, and the showing heretofore made by the plaintiff, the taking of such depositions in such manner of officials of the banks specified herein should be permitted in this case,

It is ORDERED, ADJUDGED AND DECREED that:

(a) The plaintiff be and hereby is granted permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including, without limitations, procedure for subpoenas duces tecum, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City;

(b) In connection with a return to such subpoenas duces tecum as may be issued, the aforesaid banks, in the examination of their records and the preparation of information or copies thereof, may incur unusual expenses which would not be covered by the usual witness fees as usually allowed in transactions of this type; if so any of such banks claiming such unusual expenses may file a motion with this Court setting forth a complete statement of their time and services rendered and the expense thereof, and, unless such expenses can be stipulated to and paid by plaintiff, this Court reserves the right, upon appropriate notice and hearing, as a condition to the issuance of such order, to fix a reasonable amount for the reimbursement of said expenses; and

(c) The defendant be and hereby is permitted by this Court to go to the place of, and to be in attendance at, the taking of each such deposition.

DONE and ORDERED this 9th day of March, 1960.

/s/ WM. C. MATHES
United States District Judge

[fol. 45]

EXHIBIT L TO AFFIDAVIT OF MELBER CHAMBERS—DECISION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN NO. 18276

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18,276

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

Before RIVES, Chief Judge and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

The propriety of the action of the district court referred to in the proposed petition for writ of prohibition or man- [fol. 46] damus was not before this Court nor decided by it and is not contrary to the mandate in No. 18176,[1] decided January 29, 1960. Leave to file the petition for writ of prohibition or mandamus is therefore

DENIED.

Enter for the Court this the 25th day of March, 1960.

/s/ RICHARD T. RIVES
Chief Judge, Fifth Circuit.

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[1] Styled, MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, vs. MARCOS PEREZ JIMINIZ: THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, vs. THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION; FORTUNATO HERRERA and POLINVERSIONES, C.A., a Venezuelan Corporation, vs. MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela; SILVIO GUTIERREZ vs. THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION; NAPOLEON DUPOUY vs. THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUTIERREZ ALFARO, vs. MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

(ORIGINAL FILED: March 28, 1960)

[fol. 47]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK,
FRENCH AMERICAN BANKING CORPORATION,

and

THE ROYAL BANK OF CANADA,

to quash three subpoenas duces tecum dated March 15, 1960.

AFFIDAVIT OF DAVID C. ACHESON IN OPPOSITION TO MOTION TO QUASH SUBPOENAS DUCES TECUM

District of Columbia, ss:

David C. Acheson, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Covington & Burling, attorneys for Manuel Aristeguieta, who is the plaintiff in the extradition case described in paragraph 5 of the Affidavit of Melber Chambers filed April 8, 1960. I submit this affidavit in answer to the said Affidavit of Melber Chambers and in opposition to the accompanying motion to quash filed on behalf of the First National City Bank of New York, French American Banking Corporation and the Royal Bank of Canada, on April 8, 1960.

2. Said Affidavit of Melber Chambers and motion are directed to deposition subpoenas duces tecum, served on behalf of the said Manuel Aristeguieta on or about March [fol. 48] 15, 1960, upon George F. Nolte, Assistant Vice President, First National City Bank of New York, 55 Wall Street, New York, New York; Walter Anderson, Secretary, French American Banking Corporation, 31 Nassau Street, New York, New York; and J. W. Ganaan, Agent, Royal

Bank of Canada (New York Branch), 68 William Street, New York, New York.

3. These subpoenas require the above-named individuals to appear to give on oral deposition on April 18, 1960, and to bring with them the documents and records specified in the Schedule attached to the subpoenas, as set forth in Exhibits A, B and C to the Affidavit of Melber Chambers.

4. Counsel for Manuel Aristeguieta filed a motion before the Honorable William C. Mathes, United States District Judge, sitting by designation in the Southern District of Florida, on February 25, 1960, for an order permitting the taking of the depositions of the three bank officials, (Exhibit A hereto). This motion was heard at length by Judge Mathes on March 7 and 8, and counsel for the defendant and for the three banks pressed their argument that the subpoenas contemplated by this deposition procedure were foreclosed by the orders of Judge Choate attached as Exhibits D and E to the Affidavit of Melber Chambers and by the decision of the United States Court of Appeals for the Fifth Circuit attached as Exhibit H to that Affidavit. Counsel also urged the lack of power of any court to issue a subpoena in an extradition case, and urged that the depositions were aimed at obtaining unauthorized discovery, the points made in paragraphs 21-23 (incl.) of the Affidavit of Melber Chambers. During the argument on March 7 Judge Mathes made it clear that he believed that the courts must have the power to issue a subpoena in an extradition case, and that the instant depositions and subpoenas did not seek discovery in the sense in which the three banks use that term but sought evidence to be offered in the case. Judge Mathes stated his information and belief that the [fol. 49] orders of Judge Choate were intended to leave it open for evidence to be obtained by subpoena thereafter. Excerpts from the transcript of argument are attached hereto as Exhibit B.

5. After the service of notices of depositions upon which the instant subpoenas were issued defendant filed a motion for a protective order in the United States District Court in Miami, seeking to vacate the depositions (Exhibit

C hereto). Plaintiff answered this motion (Exhibit D hereto), and Judge Mathes denied the motion by order of April 7, 1960 (Exhibit E hereto). On March 15, 1960, one of the depositors in the First National City Bank of New York whose records were included in those described in the subpoena filed a motion for a protective order (Exhibit F hereto). On March 28, 1960, Judge Mathes denied this motion (Exhibit G hereto).

6. On March 25, 1960, the United States Court of Appeals for the Fifth Circuit denied a petition of the three banks for leave to file a petition for a writ of prohibition or mandamus (Exhibit L to the Affidavit of Melber Chambers). By this petition the banks had sought to have the instant deposition notices and subpoenas vacated on the ground that the decision of the Court of Appeals in the earlier litigation (Exhibit H to the Affidavit of Melber Chambers) foreclosed the taking of a deposition by subpoena. In denying the petition of the banks the Court of Appeals ruled that it had not decided the question now before this Court.

7. It is submitted that a subpoena for the taking of a deposition may be issued in an extradition case on motion of the demanding country. The reasons for the existence of such a subpoena power are briefly set forth below.

8. There is a subpoena power under the all-writs act, 28 U. S. C. § 1651, in aid of the jurisdiction of the District [fol. 50] Judge over the extradition case. *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603 (1911); *Kamen Soap Products Co.* v. *United States*, 110 F. Supp. 430 (Ct. Cls. 1953); *Bethlehem Shipbuilding Corp.* v. *NLRB*, 120 F. 2d 126 (1st Cir. 1941).

9. Article XI of the Extradition Treaty with Venezuela, 43 Stat. 1705, presupposes that the subpoena power is available, since it provides for the offering of evidence beyond that supporting the foreign warrant of arrest.

10. The extradition statute, 18 U. S. C. § 3191, providing that the cost of witnesses shall be paid by the United States where a subpoena is issued on motion of an indigent

defendant, presupposes that a subpoena power exists in extradition on behalf of plaintiff and defendant.

11. A United States District Court may exercise judicial powers to assist the conduct of proceedings before a District Judge. See *United States, Petitioner*, 194 U. S. 194 (1904).

12. For practical reasons an extradition proceeding under 18 U. S. C. § 3184 could not have been intended by Congress to be limited to a hearing of willing witnesses, as Judge Mathes pointed out at the March 7 hearing (Exhibit B hereto).

(Sworn to by David C. Acheson on April 12, 1960.)

[fol. 51]

EXHIBIT A TO AFFIDAVIT OF DAVID C. ACHESON—MOTION FOR PERMISSION TO TAKE DEPOSITIONS

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

This motion is addressed to the Honorable William C. Mathes, United States District Judge, sitting by special assignment in the United States District Court for the Southern District of Florida.

It is addressed to him in his capacity as a Judge exercising the powers of the District Court, or, if there be a

difference, in his capacity as a District Judge exercising the powers of an Extradition Judge, or in both his capacities.

It invokes the powers provided for by 18 U. S. C. 3184 and related statutory provisions, by the Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698, including, without limitation, Article XI thereof, by 28 U. S. C. 1651 and by such other sources of power, statutory or otherwise, as may be appropriate to the end in view.

I

On November 9, 1959, the plaintiff served notice of deposition upon the defendant for the deposition of an [fol. 52] official of the First National City Bank of New York, and on November 10, 1959, a *subpoena* duces tecum was issued by the Clerk of the United States District Court for the Southern District of New York pursuant to such notice and was duly served. On November 12, 1959, the plaintiff served a notice of deposition upon the defendant for the deposition of an official of the French American Banking Corporation, and on November 13, 1959, a *subpoena* duces tecum was issued by the Clerk of the United States District Court for the Southern District of New York pursuant to such notice and was duly served.

On November 12, 1959, the defendant filed herein a motion for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure alleging that the proposed deposition of an official of the National City Bank did not conform with Rule 15 of the Federal Rules of Criminal Procedure. (Although this motion did not specify the proposed deposition of an official of the French American Banking Corporation, all concerned thereafter treated the proceedings pursuant to the motion as though it had been addressed to both proposed depositions.)

In the absence from this District of Judge Mathes, the motion came on for hearing before Chief Judge Choate on November 13, 1959. On that day Judge Choate entered an order prohibiting the taking of deposition pursuant to the particular notice in question. He gave as his reason the opinion that the Federal Civil Rules do not apply to

this proceeding but that the Federal Criminal Rules shall govern this proceeding "as they may apply." But thereafter on November 23, 1959, Judge Choate entered a further order which superseded and took the place of the statement of reasons set forth in his order of November 13 and provided instead that the proceeding herein should be governed by the Treaty of Extradition, stating the opinion that a witness can be subpoenaed in this proceeding.

After further proceedings before Judge Mathes on November 23 during which the question of subpoenas was argued by counsel for the plaintiff and counsel for the [fol. 53] defendant, Judge Mathes, on motion of the plaintiff, entered five orders on November 25, 1959, directed to the following persons:

George F. Nolte, Assistant Vice-President
First National City Bank of New York
(successor to National City Bank of New York),
55 Wall Street, New York City, N. Y.

Walter Anderson, Secretary
French American Banking Corporation,
31 Nassau Street, New York City, N. Y.

J. W. Ganaan, Agent
Royal Bank of Canada (New York Branch),
68 William Street, New York, N. Y.

Isaac B. Grainger, President
Chemical Corn Exchange Bank
(now Chemical Bank New York Trust Company),
165 Broadway, New York 15, N. Y.

Wallace M. Davis, President
The Hibernia National Bank In New Orleans
Carondelet, Gravier & Union Street,
New Orleans, La.

Each such order commanded the person in question to appear before Judge Mathes in his court in the Southern District of Florida in Miami on December 14, 1959, and bring certain specified records and other papers, provided that if counsel for the plaintiff and counsel for the defen-

dant were permitted to examine such papers and to make such copies thereof as they desired prior to December 14 such appearance in court, or return, would not be required.

The foregoing orders were duly served by United States Marshals on the persons named, in the manner provided for service of subpoenas under the Federal Criminal Rules.

Mr. Davis of the Hibernia National Bank In New Orleans promptly furnished, through counsel, to counsel for the plaintiff and counsel for the defendant such papers [fol. 54] covered by the order as existed in the Hibernia National Bank.

On December 14, 1959, Mr. Grainger of Chemical Bank New York Trust Company (successor to Chemical Corn Exchange Bank) appeared before Judge Mathes through an appropriate representative with certain of the papers required but indicated that more time would be necessary to assemble the remainder of the papers.

Judge Mathes, in an order entered on December 15, 1959, granted additional time to Mr. Grainger, and the papers brought at that time were not submitted. Subsequently the time for production was further extended to January 27, 1960. Prior to that date counsel for Mr. Grainger advised counsel for the plaintiff that there had been assembled all the papers covered by the order as existed in Chemical Bank New York Trust Company and that permission to inspect and copy in his office in New York City would be granted, depending upon the outcome of certain proceedings instituted by a depositor of Chemical Bank New York Trust Company, Mr. Silvio Gutierrez, which will be referred to hereafter. (Later Judge Mathes postponed the January 27 date to March 7, 1960, as will be noted below.)

Prior to December 14, 1959, the First National City Bank, French American Banking Corporation and Royal Bank of Canada filed their joint motion to quash the aforesaid orders or subpoenas directed to Messrs. Nolte, Anderson, and Ganaan, and such motions were argued before Judge Mathes on December 14.

Also prior to December 14, 1959, Mr. Silvio Gutierrez filed a motion to quash the order directed to Mr. Grainger, insofar as the order related to papers respecting the account of Mr. Silvio Gutierrez in Chemical Bank New York Trust

Company, and such motion was argued before Judge Mathes on December 14. Likewise, prior to December 14, 1959, Mr. Napoleon Dupouy filed a motion to quash the orders directed to Mr. Nolte and Mr. Anderson, insofar as they related to papers respecting accounts of Mr. Napoleon [fol. 55] Dupouy in the respective banks of which the foregoing persons are officials, and such motion was argued before Judge Mathes on December 14.

On December 15, 1959, Judge Mathes entered an order denying the motions to quash of the three Banks, of Silvio Gutierrez and of Napoleon Dupouy. Judge Mathes also extended to January 4, 1960, the time for complying with his orders. The three Banks, Silvio Gutierrez and Napoleon Dupouy filed notices of appeal from Judge Mathes' order and filed motions to stay the requirement for compliance with the orders pending such appeal. These motions to stay came before Judge Mathes on January 4. Judge Mathes denied such motions, but extended until January 27, 1960, the time for compliance with his orders after representation by counsel for the three Banks that the Banks had been gathering the papers called for by the orders and that another fifteen days would be a period "within the bounds of reason" for full compliance. (Transcript of January 4 hearing, pp. 188-189).

Likewise on January 4, 1960, Mr. Fortunato Herrera and the Venezuelan corporation, Polinversiones, C. A., brought on before Judge Mathes a motion to quash all five of the orders insofar as they related to papers respecting accounts of the movents. (In fact neither movent had an account in the Hibernia National Bank, and we are informed by counsel for Chemical Bank New York Trust Company that neither movent had an account in that bank either.) On the same date Mr. Gutierrez Alfaro and Mrs. Lola T. de Gutierrez Alfaro brought on before Judge Mathes a motion to quash the order directed to Mr. Nolte insofar as it related to papers respecting the account or accounts of the movents in the First National City Bank. These motions to quash were denied by Judge Mathes, and the movents filed notices of appeal to the Court of Appeals for the Fifth Circuit.

The three Banks filed a motion in the Court of Appeals for a stay pending appeal, and a petition for permission to file a petition for writ of prohibition or mandamus as an [fol. 56] alternative to their appeal. On January 20, 1960, such Court issued a stay respecting the three orders or subpoenas involved in the appeal by the three Banks until final decision by that Court in the matter. It also set the Banks' appeal for argument on January 27. At the same time it set for argument the Banks' alternative petition for permission to file a petition for writ of prohibition or mandamus, and any other motions or petitions respecting the three orders or subpoenas involved in the Banks' appeal.

Each of the depositors heretofore referred to also filed in the Court of Appeals, alternative to their appeals, petitions for permission to file a petition for writ of prohibition or mandamus. The January 20 order of the Court of Appeals provided that such petitions filed by Silvio Gutierrez and Fortunato Herrera and Polinversiones would be heard at the January 27 argument. Thereafter, at that argument, the Court also heard the cases of Napoleon Dupouy and of Gutierrez Alfaro and Lola T. de Gutierrez Alfaro.

On January 26, 1960, Judge Mathes continued all proceedings in this case until March 7, 1960, from the date of January 27 which he had theretofore fixed.

On February 1, 1960, after the argument of January 27, the Court of Appeals entered its order, one judge dissenting, reversing the order of Judge Mathes on the three Banks' motions to quash the three orders or subpoenas involved in the Banks' appeal. The parties had stipulated that the petitions for permission to file petitions for writs of prohibition or mandamus, filed by the three Banks and the several depositors, would be treated as granted, and in its order the Court of Appeals denied the petitions for writs of prohibition or mandamus.

The plaintiff filed a motion with the Court of Appeals to clarify the basis for its order of reversal, but the Court denied such motion.

The plaintiff, upon instruction from his Government, will petition the Supreme Court for a writ of certiorari to review the order of the Court of Appeals, and such petition is now in preparation.

[fol. 57]

II

The plaintiff, acting on behalf of and at the instruction of his Government, is keenly conscious of the importance of his right to process from the judicial functionaries of the United States which will assure production of evidence upon the issues in this cause both in the interest of justice and in the interest of maintaining the efficacy of solemn extradition covenants between nations.

The plaintiff, and his Government, are equally conscious of the importance of the conclusion of this proceeding as speedily as feasible in order that the defendant may be brought to trial on the allegations made against him without any unnecessary delay.

It would seem, therefore, that there should be prompt pursuit by the plaintiff of means other than those ordered by Judge Mathes on November 25, 1959, to assure production of evidence. If other means are permitted, and are accomplished prior to the Supreme Court review of the order of the Court of Appeals, such review will be mooted and the progress of this proceeding will have been hastened. If such means are resisted by the persons from whom evidence is sought legal questions concerning them can be presented to the Supreme Court at the time it considers the order of the Court of Appeals so that at one time it can determine the appropriate, or the most appropriate, measures for securing evidence, instead of having to do so piecemeal, and so the progress of this proceeding will have been hastened.

III

The alternative to the means ordered by Judge Mathes on November 25, 1959, is procedure such as provided in the Federal Civil Rules for the taking of depositions. This means was not before the Court of Appeals in the case determined by its order of February 1, 1960, and Judge Mathes is free to permit its pursuit.

[fol. 58] It is prayed, therefore, that the plaintiff be permitted to proceed in accordance with the procedure provided in the Federal Civil Rules, either as authorized by those

Rules or pursuant to authority to proceed in a manner analogous to that provided for in those Rules, to take the depositions, pursuant to subpoenas duces tecum, of the following:

1. George F. Nolte, Assistant Vice-President
   First National City Bank of New York,
   55 Wall Street, New York City, N. Y.
2. Walter Anderson, Secretary
   French American Banking Corporation,
   31 Nassau Street, New York City, N. Y.
3. J. W. Ganaan, Agent
   Royal Bank of Canada (New York Branch),
   68 William Street, New York, N. Y.
4. Isaac B. Grainger, President
   Chemical Bank New York Trust Company,
   165 Broadway, New York 15, N. Y.

It is proposed that such depositions be taken by issuance of notices of deposition and by service of subpoenas issued by the Clerk of the United States District Court of the Southern District of New York or other appropriate official of such Court, as provided in the Federal Rules of Civil Procedure.

It is further proposed that each subpoena will call for the production of the papers set forth in the orders of Judge Mathes issued to these same persons on November 25, 1959.

(Subscription and certificate of service omitted.)

[fol. 59]

EXHIBIT B TO AFFIDAVIT OF DAVID C. ACHESON—EXCERPTS FROM HEARING BEFORE JUDGE MATHES ON MARCH 7 AND 8, 1960

Excerpts from Proceedings in the United States District Court for the Southern District of Florida, Miami Division before the Honorable William C. Mathes, United States District Judge, in Case No. 9425-M-Civil, Aristeguieta v. Perez Jimenez, March 7 and 8, 1960.

(1)—

"The Court: To follow you there, I would have to say, would I not, that only the witnesses who volunteer to come can the plaintiff produce?

"Mr. Wilson [counsel for the First National City Bank]: I think probably that that is correct. And Judge Hutcheson—

"The Court: And if there are any unfriendly people whom he wishes to come into court and tell the truth before the magistrate, there is no way he can compel them to come in? They may be standing out in the hallway and he can't get them?

"Mr. Wilson: The only power for witnesses is in that indigent statute section. Judge Hutcheson pursued that as—

"The Court: With all due respect to Judge Hutcheson and Judge Jones I would have to read it from them, before I could accept it as their holding in this case because all they have said, as I view it, they said that this procedure is not available."

* * * * * * *

"The Court: Are you saying that we have no power of process whatever? Is that what you are saying?

"Mr. Wilson: There is no power of discovery.

"The Court: I said 'process.'

"Mr. Wilson: Or process in aid of the demanding Government by virtue of subpoena.

"The Court: And you are saying that if a witness is standing out here in the hall and does not want to come in [fol. 60] and testify and the defendant wants him—the defendant wants him, not the plaintiff—then do we have any power to order him in here to take the stand?

"Mr. Wilson: Your Honor, it is our contention and it was made before the Court of Appeals and explored at length that there was no such power. . . . "

* * * * * * *

"The Court: * * *

"What would you say as to the power of the Court to issue a subpoena a block down the street here to compel

the attendance of a recalcitrant witness whom the defendant wants?

"Mr. Wilson: I say that there is no power to issue any subpoena on behalf of anyone except an indigent defendant under Title 18, Section 3191."

• • • • • • •

"The Court: As I understand your argument, do you suggest that because the statute expressly mentions indigent defendants, the court has ample power to subpoena those people at Government expense for the indigent; but the man who has a lot of money can't even get a witness from downstairs to come up? If the witness is unwilling, what is the man with money going to do for his defense?

"Mr. Wilson: Your Honor, I don't question at this point at any rate, the wisdom of Congress. I merely say that Title 18, Section 3191, gives that power only to an indigent fugitive; and I say the doctrine of expresso unius should apply. And if that power—and I say that is no basis for an inference, as I put it—I think before that, we may vault the fence and say because it is given to an indigent fugitive it may be given also by inference or conjecture to the demanding country here. That is unwarranted.

"The Court: But what about the defendant who has some money and he wants to compel the attendance of a witness? He wants to pay the Marshal. He doesn't want the Government to do it. He doesn't want the taxpayers of the United States to have to do it.

[fol. 61] "'Here is the Marshal's fee, here are all the costs,' he says. You would say, I take it, that the court has no power to issue that subpoena?

"Mr. Wilson: I say that the only power that I find anywhere—and I hope Mr. Westwood will show me some other source of power, I challenge him to—is in Section 3191, and that applies only to indigent defendants. What a wealthy defendant would do, I don't know; but we are not concerned with that. We are dealing with the facts before us, and facts are here that the demanding Government, which comes into this country and seeks a privilege accorded by Treaty only and by the governing statutes, there

is no such power in that demanding Government and no such power can be exercised on its behalf."

• • • • • • •

"The Court: I am forced to believe or take the view, as I see it, that this court either has it or that it conducts a sterile hearing, hearing only people who want to come here, unless a man is poor enough that he can say that he does not have any money with which to pay; then we have full power, or it is that we have the power or that the judge who acts or is sitting as a committing magistrate has the power of his office and the Congress intended him to have the power of his office. So I take that latter view now."

(2)—

"Mr. Walters [counsel for defendant]: If your Honor will recall from the record, although in this Court you, as presiding Judge, did not enter the order, there had been an order of prohibition against the taking of depositions signed by Judge Choate as far as—

"The Court: Judge Choate vacated that, didn't he?

"Mr. Walters: No, sir, he did not. He modified it, but not in so far as it relates to the prohibition.

[fol. 62] "The Court: I may be relying on what Judge Choate told me; but as I understand it, the matter had been set at large. There have been two orders entered.

"Mr. Walters: Only in so far as it relates to Judge Choate's opinion.

"The Court: I think Judge Choate decided he had enough headaches of his own, and that he wasn't going to borrow this one from me. And he just set it at large and let me have it.

"Mr. Walters: No, that is not the case, your Honor. As a matter of fact, on November 23rd Judge Choate modified his order but only in so far as it related to the question of what his opinion the rules of practice required. However, there was and still exists an order that is effective as against the plaintiff for the taking of depositions, which is a prohibition against the taking of depositions on a protective order as far as the respondent is concerned.

"The Court: That was against that one notice, isn't that right?"

• • • • • • •

"Mr. Walters: Except this Court has an existing order.

"Now, at the risk of being somewhat presumptuous, I would like to bring to the Court's attention—it is on a decision in California, dated April 25, 1958, in the case of Rojas Gutierrez versus Coy, in which it says that the judges who sit in the very same courthouse should not attempt to overrule the decisions of each other except for the most cogent reasons.

"The Court: And I never will. These orders are not entirely clear. But I discussed the matter with Judge Choate, and while he has agreed with me that the court has the power, could assert the power, because of this being a matter of Treaty and its effect on Constitutional stature or statutes, the court should be able to invoke the power under the all writs statute. The Court of Appeals said no, and I know he believes that the court has the power to take depositions.

[fol. 63] "What he was called upon here to do was to issue a protective order, which he did for the time being, with respect to that order. He does not intend to rule that there was no power to take depositions in the manner provided by the Rules of Civil Procedure."

(3)—

"Mr. Walters: Do I understand that the Court believes that in an extradition proceeding there is a power of discovery?

"The Court: Yes.

"Mr. Walters: My concept of extradition is that a request is made by a foreign power to extradite a man who commits a crime because a probable cause for that commission has been established by evidence that was before some competent tribunal in that country, and that point, particularly in this case last July and August, the evidence was apparent as to probable cause.

"What we are doing in this case, we are extending the services of the FBI, so to speak, to a foreign Government to investigate through the measures available by this Court.

"If they proceed in this case through discovery, ultimately when they get down to presenting the evidence, they must do it through a subpoena duces tecum which, in my mind, the Court of Appeals has said is not proper.

"The Court: Discovery is a broad term. If you mean to file a suit and find out the evidence to support it later, that is one view of discovery. Discovering the existence of other evidence is another view of discovery.

"I think I mentioned one time, it seems to me, that in proceedings such as this the plaintiff might have a dozen witnesses in Venezuela who could establish or show probable cause to believe the existence of some facts and rather than bring them here, the plaintiff could subpoena some records here or, in that sense, discover evidence here instead of bringing that evidence from Venezuela."

[fol. 64] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-11-188

In the Matter of the Application

of

NAPOLEON DUPOUY

to quash two subpoenas duces tecum dated March 15, 1960.

ORDER TO SHOW CAUSE TO QUASH SUBPOENAS DUCES TECUM —Filed April 13, 1960

Upon the annexed affidavit of Charles Pickett, sworn to the 12th day of April, 1960, let Manuel Aristeguieta, Consul General of the Republic of Venezuela, or his attorneys, show cause before this Court, at Room 506, United States Court House, Foley Square, New York City, on the 14th day of April, 1960, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made herein quashing two subpoenas duces tecum served upon The First National City Bank of New York and French American Banking

Corporation, respectively, on or about March 15, 1960 (copies of which are attached as Exhibits A and B to the annexed affidavit) on behalf of the demanding country in an extradition proceeding pending at Miami, Florida, or so much of said subpoenas as would require said banks to appear on April 18, 1960 to produce the documents relating to the accounts of Napoleon Dupouy with said banks, referred to in said subpoenas, on the ground that the use of such discovery proceedings is not available in aid of said extradition proceeding, and for such other, further and different relief as to the Court may seem just and proper, and

Sufficient reason appearing therefor, let service of a copy of this order and the affidavit upon which it is granted, made upon respondent or his attorneys, on or before 3:00 p. m. on the 13th day of April, 1960, be deemed timely and sufficient.

Dated: New York, N. Y., April 13, 1960.

Sylvester J. Ryan, Chief Judge.

[fol. 65]

AFFIDAVIT OF CHARLES PICKETT

State of New York,
County of New York, ss.:

Charles Pickett, being duly sworn, deposes and says:

1. I am a member of the bar of this court and a member of the firm of Chadbourne, Parke, Whiteside & Wolff, attorneys for Napoleon Dupouy, movant herein. I make this affidavit in support of a motion to quash two subpoenas duces tecum served on two banks in New York City—The First National City Bank of New York (hereinafter called "City Bank") and French American Banking Corporation (hereinafter called "French American")—in particular, so far as they seek a sweeping discovery of the transactions in accounts which Mr. Dupouy has with those banks.

2. This affidavit is made upon information and belief. In addition to an examination of the documents in the

pertinent files of Messrs. Coudert Brothers, the attorneys for French American, including copies of the documents referred to herein, the sources of my information are (a) the affidavit of Melber Chambers, sworn to April 8, 1960, in support of a motion by City Bank, French American and The Royal Bank of Canada to quash three subpoenas duces tecum, including the subpoenas which are the subject of this motion; (b) Wilson B. Copes, Esq., a member of the Los Angeles law firm of Dempsey, Thayer, Deibert & Kumler, the general attorneys for Mr. Dupouy; and (c) Herman Compter, Esq., a member of the firm of Shearman & Sterling & Wright, attorneys for City Bank, and A. Edward Gottesman, Esq., an associate of Messrs. Coudert Brothers, attorneys for French American, both of whom are generally familiar with all the prior proceedings referred to herein.

[fol. 66] 3. Napoleon Dupouy, a citizen of Venezuela, is a resident of Beverly Hills, California. The subpoenas involved herein were served on behalf of the demanding country, the Republic of Venezuela, in an extradition proceeding against one Marcos Perez Jimenez pending in Miami, Florida. Copies of those subpoenas are attached hereto, marked Exhibits A and B, and made a part hereof. A similar subpoena (a copy of which is attached hereto, marked Exhibit C, and made a part hereof) was served upon The Royal Bank of Canada (hereinafter called "Royal Bank") but movant does not object thereto as he had no account with that bank.

4. The subpoenas involved herein were issued in the name of Herbert A. Charlson, Esq., Clerk of this court. They call for a sweeping discovery of the banks' records relating to transactions in Mr. Dupouy's accounts with them. They seek, among other things, the production of all records of City Bank and French American relating to all transactions of $1,000 or more in Mr. Dupouy's accounts with those banks from March 14, 1949 through June 30, 1958—with any and all persons whatsoever, irrespective of whether they are involved in the extradition proceeding against Marcos Perez Jimenez.

5. Said subpoenas are returnable at the United States Court House, Foley Square, Manhattan, on April 18, 1960. They call for production of the records of bank accounts of 22 named persons and concerns, including Mr. Dupouy. Those records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and related correspondence.

6. The subpoenas were issued on behalf of respondent, Manuel Aristeguieta, the diplomatic representative of the demanding country in an extradition proceeding brought under Section 3184 of Title 18, United States Code, and the [fol. 67] 1923 Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698.

7. That extradition proceeding was begun in August 1959 by Manuel Aristeguieta, as Consul General of the Republic of Venezuela. It is still pending at Miami, Florida, before Honorable William C. Mathes, a United States District Judge.

8. That extradition proceeding seeks the extradition of Marcos Perez Jimenez, formerly President of the Republic of Venezuela, on the grounds of complicity in homicides, extortion, bribery, illicit enrichment, embezzlement and criminal malversation.

9. The complaint in the extradition proceeding has been amended several times. Incorporated in the current version, the "Second Amended Complaint for Extradition," are "extradition documents," stated to have been "properly and legally authenticated" (par. 12), which include charges filed in the Federal Court of the Republic of Venezuela supported by "voluminous documentary evidence," and also "considerable excerpts from the evidence that was before the Federal Court" (par. 12).

10. About November 10, 1959, City Bank was served with a subpoena duces tecum substantially similar to Exhibit A hereto. On motion of Marcos Perez Jimenez an order was entered on November 16, 1959 in the extradition proceeding, vacating "the Notice of Taking Depositions" and "all summonses connected therewith." A copy of that

order is attached hereto, marked Exhibit D, and made a part hereof.

11. The order of November 16, 1959 (Exhibit D) also provided that the procedure in the extradition proceeding would be subject to the Federal Rules of Criminal Procedure and that the Federal Rules of Civil Procedure would [fol. 68] not apply. That part of the order, however, which related "to the establishment of special rules governing procedure," was vacated by a later order of November 23, 1959, a copy of which is attached hereto, marked Exhibit E, and made a part hereof.

12. In December 1959 each of the three banks mentioned above was served in New York City with a subpoena duces tecum returnable in Miami, requiring production of virtually the same records sought under subpoenas involved herein (Exhibits A and B hereto). The subpoenas were substantially identical. A copy of the subpoena served on City Bank in December 1959 is attached hereto, marked Exhibit F, and made a part hereof.

13. The subpoenas served in December 1959 (Exhibit F hereto) were granted on motion of the Consul General of Venezuela. In his affidavit in support of the motion, one of his attorneys said (affidavit of Sidney S. Sachs, sworn to November 25, 1959, pars. 7 and 8):

> "7. The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the defendant and others, as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant.
>
> "8. In affiant's opinion it is essential that the requested subpoenas be issued in order that the full evidence may be produced and the interests of justice thereby served."

14. The three banks moved before Judge Mathes to quash the subpoenas (Exhibit F hereto). Several depos-

itors whose bank records were sought by the subpoenas (including Mr. Dupouy, movant herein) also moved before Judge Mathes to quash the subpoenas.

[fol. 69] 15. On December 15, 1959 an order was entered which denied the motions to quash but modified the subpoenas in certain respects. A copy of that order is attached hereto, marked Exhibit G, and made a part hereof.

16. Thereafter the banks and the moving depositors (including Mr. Dupouy) appealed to the United States Court of Appeals for the Fifth Circuit from the order of December 15, 1959 (Exhibit G hereto). Applications were also made for writs of prohibition or mandamus directing the District Judge to quash the subpoenas.

17. On February 1, 1960 the Court of Appeals decided that the order of December 15, 1959 (Exhibit G hereto) "should be reversed" and the subpoenas quashed. It held unanimously that the order was appealable. A majority of the court held that the subpoenas should be quashed. Attached hereto and made a part hereof are copies of the decision (Exhibit H) and mandate (Exhibit I) of the Court of Appeals, and the order entered below on its mandate (Exhibit J).

18. The Consul General of Venezuela subsequently moved the Court of Appeals to clarify its decision. This motion was denied without opinion.

19. The Consul General then took the position that the decision of the Court of Appeals was not intended to pass upon any appeal by the depositors because the depositors lacked standing to question the order appealed from. Accordingly, he moved in the Court of Appeals to dismiss the depositors' appeals, in the hope that the Court of Appeals would clarify its action on this point.

20. As a result, on March 25, 1960 the Court of Appeals handed down an Amended Judgment, stating in effect that it had passed not only on the appeals of the banks but also those of the depositors, including Mr. Dupouy. A copy of [fol. 70] that Amended Judgment is attached hereto, marked Exhibit K, and made a part hereof.

21. Meanwhile the Consul General had made another motion in the extradition proceeding for permission "to take the depositions, pursuant to subpoenas duces tecum" of certain officers of the banks. That motion proposed "that such depositions be taken by issuance of notices of deposition and by service of subpoenas" and stated that the proposed subpoenas duces tecum would call for production of the identical papers referred to in the subpoenas quashed at the direction of the Court of Appeals.

22. That motion was argued on March 7 and 8, 1960. Counsel for the Consul General made it clear that he did not need, for his case in chief, any of the documents sought by the subpoenas involved herein.

(a) Mr. Westwood, Counsel for the Consul General, pointed out that the documents sent from Venezuela were still in process of being translated from Spanish, and said (transcript, p. 377):

> "There are some 2,000 pages of English translation which have been involved."

He stated that all the material would be ready about March 30, 1960. The following colloquy took place (transcript, p. 380):

> "The Court: Would that mean that the plaintiff would rest upon that record?
> "Mr. Westwood: That is right.
> "The Court: Your case in chief?
> "Mr. Westwood: That's right, your Honor."

(b) Later Mr. Westwood added (transcript, pp. 381-382):

> "So that what we have in mind, then, is a submission by March 30th of our case in chief in the form that I have indicated."

[fol. 71] (c) Thereafter the following colloquy ensued (transcript, pp. 392-393):

> "The Court: I understand that the plaintiff expects to rest upon the record made upon these translations. Am I correct in that?

"Mr. Westwood: That is right, your Honor.

"The Court: And then you will put the defendant to any defense he wishes to make, and if any additional evidence by way of rebuttal is available, you will use it."

23. At the argument on the preceding day, Judge Mathes said that he believed "that in an extradition proceeding there is a power of discovery" (transcript, p. 282). He stated, however, that it would be up to a judge in New York "as to what questions should be answered and what documents should be produced upon the depositions" (transcript, p. 281; see also, p. 328). In fact, he said (transcript, p. 335):

"The Court: All I am doing is entering an order granting permission to take depositions.

"Mr. Hunkey [Counsel for the three banks]: Yes, sir.

"The Court: Whether the United States District Court for the Southern District of New York will issue the subpoenas to take the depositions is another matter. I can't issue the stay. You may attack it there, if you like.

"Mr. Hunkey: Well, you shall not stay it, you say?

"The Court: It's an order granting permission to take a deposition, that's all."

24. On March 9, 1960 Judge Mathes made an order in the extradition proceeding granting the Consul General "permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure," including the issuance of sub-[fol. 72] poenas duces tecum to the banks named above. A copy of that order is attached hereto, marked Exhibit L, and made a part hereof.

25. Thereafter the subpoenas duces tecum involved herein (Exhibits A and B hereto) were served.

26. Shortly thereafter the three banks petitioned the Court of Appeals for the Fifth Circuit for permission to

file a petition for a writ of prohibition or mandamus directing vacation of the March 9, 1960 order (Exhibit L hereto), on the ground that Judge Mathes had misconstrued the decision of the Court of Appeals (Exhibit H hereto) and failed to give effect to its mandate.

27. On March 25, 1960, that petition was denied by the Court of Appeals, without passing on the propriety of Judge Mathes' order of March 9, 1960 (Exhibit L hereto). A copy of the order of the Court of Appeals is attached hereto, marked Exhibit M, and made a part hereof. In it, the Court of Appeals said:

> "The propriety of the action of the district court referred to in the proposed petition for writ of prohibition or mandamus was not before this Court nor decided by it and is not contrary to the mandate in No. 18176, decided January 29, 1960."

28. That the sweeping subpoenas involved herein are a fishing expedition undertaken in the hope of discovering additional evidence of some crime also appears from the Consul General's "answer" of March 31, 1960, to a motion filed by Marcos Perez Jimenez for a protective order. It stated, among other things:

> "On March 14, 1949, the beginning date for the deposition subpoenas, the defendant declared under oath that he had a net worth equivalent to only $31,343.28. During his term of office his legitimate salary, bonuses and expense allowances averaged ap- [fol. 73] proximately $30,000 a year. Nevertheless, plaintiff's necessarily fragmentary evidence as to the wealth accumulated by defendant will show that during this period, in addition to acquiring several millions of dollars worth of real and personal property, he deposited or had deposited for him or in any event received in his United States bank accounts approximately $4,400,000. Existing evidence will trace to its illegal sources about $500,000 of these deposits. The records of the banks to which the deposition subpoenas are directed will assist in tracing the balance to its

sources, and there is every likelihood that these records will disclose significant additional deposits."

29. As we will show in our memorandum, enforcement of the sweeping subpoenas duces tecum involved herein would be an unauthorized and unwarranted extension of discovery procedures to an extradition proceeding.

30. An order to show cause is sought herein because time does not permit this motion to be brought on, by notice of motion, before the subpoenas duces tecum involved herein are returnable on April 18, 1960. The papers herein were prepared as soon as possible after my firm was retained (on the afternoon of April 8, 1960) to represent Mr. Dupouy by his Los Angeles attorneys. No previous application has been made for the relief sought herein.

(Sworn to by Charles Pickett on April 12, 1960.)

(Exhibits A through J to the affidavit of Charles Pickett are the same, respectively, as Exhibits A through J to the affidavit of Melber Chambers. See printed pages 14 to 37, side folios 16 to 42, *supra*.

Exhibits L and M to the affidavit of Charles Pickett are the same, respectively, as Exhibits K and L to the affidavit of Melber Chambers. See printed pages 37 to 41, side folios 43 to 46, *supra*.)

[fol. 74]

EXHIBIT K TO AFFIDAVIT OF CHARLES PICKETT—AMENDED MANDATE OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN NO. 18176

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18,176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C. A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

[fol. 75]

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

Appeal from the United States District Court for the Southern District of Florida –and– Motions for Leave to File Petitions for Writs of Prohibition or mandamus.

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

[fol. 76]

AMENDED JUDGMENT

IT IS ORDERED that the judgment of this Court entered on January 29, 1960 and issued on March 3, 1960 as and for a mandate be, and the same is hereby amended to read as follows:

This cause came on to be heard on all five appeals pending in this cause; that is, the joint appeal by the First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada, the appeal of Silvio Gutierrez, the appeal of Napoleon Dupouy, the appeal of Fortunato Herrera and Polinversiones, C. A., and the appeal of Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro, and on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court denying the motions to quash the subpoenas duces tecum in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to quash the subpoenas duces tecum; and that the petitions for writ of prohibition or mandamus are denied.

It is further ordered and adjudged that the appellants, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada recover their taxable costs in this Court from the appellee, Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

"Rives, Chief Judge, Dissenting."

March 25, 1960

(Original Filed: March 28, 1960)

[fol. 77]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM HEARING BEFORE JUDGE RYAN ON MAY 13, 1960

The Court: Gentlemen, I had this matter on before me and I heard some argument on the 14th of April. Thereafter another motion was made by a depositor of the Chemical Bank.

I have reviewed the briefs. I was troubled somewhat by one question, as to whether or not this was an attempt to use the process of the Court to investigate whether or not evidence could be disclosed in this country of the commission of a crime in a foreign jurisdiction, and, of course, I feel quite firmly that the process of this Court may not be used for that purpose. I am now of the opinion that this matter must be resolved in favor of the demanding country. This is simply an attempt to place on record testimony and evidence in support of its request for extradition and is but an attempt on the part of the demanding country to present evidence to the Court which would convince the Court that there is prima facie evidence of the commission of the crime charged.

If, however, you gentlemen desire to present any further arguments this morning, I will hear you. Otherwise, very frankly, I have written my opinion in this case and I am prepared to file it and give it to you. If you want to be heard now, I will hear you, but I have very carefully gone through the briefs for each side and I have not reached any hurried decision.

* * * * * * *

The Court: But that is entirely different. That case is entirely different. No, you will find that Judge Learned Hand, I think, wrote an opinion following the appeal in the case of Gubichev's companion who was convicted, the accomplice, Coplon, U. S. v. Coplon, and I feel here that the Court down in Miami not only has a right to compel attendance of witnesses to establish probable cause but

it is the duty of the Court, upon reasonable request, to issue process and to hear that testimony.

[fol. 78] Suppose, for instance, that an assault or a murder is committed down in Venezuela and that the only eye-witness fled the jurisdiction of the Court and sought refuge up here in the United States, that there were no witnesses down there available in Venezuela and the only witness was up here in the United States. Would you say that a Judge of this Court or a Judge before whom a request for a warrant of extradition was made would not compel the attendance of that only witness to the alleged crime when he was within the jurisdiction of the Court which was required to determine probable cause?

* * * * * * *

Mr. Pickett: Your Honor, I don't want to rehash the same ground. I would like to address myself to two points.

First, as to the hypothetical case which you gave before of the eye-witness who is here in New York, where you put the question whether the court, sitting in the extradition proceeding, should have the power to subpoena that witness, that, I submit, your Honor, is not the case which is presented to your Honor. The case presented to your Honor is not a case where the demanding country needs the testimony which it seeks to elicit here.

The Court: We don't know whether it needs it or not. You believe that it does not. Counsel for the requesting government states that in their opinion they have sufficient evidence to establish probable cause. But the judge has the final word on it.

Mr. Pickett: Suppose that the judge, when they are through, says "I don't believe that you have established probable cause." Wouldn't that be the appropriate time for them to attempt to get this evidence? He doesn't have to make a final determination. He can say, as has happened in many of these cases—

The Court: But the quantum of evidence, the quantum of cumulative evidence that anyone who has the burden of proof submits rests first in his own judgment and discretion as to whether or not, as counsel, he should call that witness [fol. 79] and then it rests in the determination of the judge

as to whether or not he should hear it. But no court has a right to regulate the conduct of the presentation of evidence as to whether or not witnesses shall or shall not be called. Counsel calls them. If the court does not want to hear them, then the court makes its ruling. But I think it is inappropriate for any court to make a ruling in advance.

Mr. Pickett: But, your Honor, don't you believe that in a case of this sort the burden should be on the party who desires to take the testimony to show in advance not necessity but probable reason to think that the evidence is going to be needed or will be important? That would be necessary if an application were made for a subpoena in a civil case. The party desiring the subpoena normally would have to show good cause, which doesn't mean absolute necessity but probable utility and need for it. Isn't that what should be done by the demanding country?

The Court: I think there is a sufficient showing of that here.

Mr. Pickett: Despite the fact, your Honor—

The Court: That the subpoena is issued in good faith. That is about all that these requirements show.

Mr. Pickett: I am talking about more than subjective good faith. I am talking about objective probable or good cause.

The Court: No, there is sufficient here. There is sufficient here in the record to satisfy that, and I have so determined.

Mr. Pickett: May I then address myself to one other point, your Honor. The subpoenas in question ask for the production of accounts dealing with transactions with all persons whether or not named as alleged co-conspirators with the accused in the second amended complaint. To the extent that the subpoena purports to elicit evidence of records going beyond the persons named or beyond transactions with the persons named in the second amended complaint, I suggest that the subpoena be limited. Otherwise we have then a pure fishing expedition of the kind your Honor was talking about.

[fol. 80] The Court: My recollection is that there was a motion made before Judge Mathes to limit the scope of these subpoenas, and he ruled upon the extent to which the

subpoenas might extend or the documents they might call for. Am I wrong on that as to my recollection? My recollection is that the record shows there was a motion made like that. I have not looked at these papers for several days.

Mr. Pickett: Before the appeal to the Fifth Circuit there were motions made, and Judge Mathes limited the subpoenas involved in the Fifth Circuit case. As far as I know, no such motion was made before Judge Mathes by any of the parties presently before your Honor.

The Court: These subpoenas which are now before the court are almost identical in language to the ones which resulted after Judge Mathes' order of limitation.

Mr. Pickett: The subpoenas issued by this court are substantially the same.

The Court: So that they accord with Judge Mathes' order.

Mr. Pickett: I may say that the point I raised, as far as I know, was not argued before Judge Mathes.

The Court: He entered an order, and I think that any objection you desire to urge at this time on this point might well be urged at the hearing.

Here is where I get my recollection from. There was an order entered on a hearing of December 14, 1959, by Judge Mathes.

Mr. Pickett: Yes, your Honor. That was before the appeal to the Fifth Circuit.

The Court: In that order he recites that the court has determined that some modification would be advisable and that therefore the subpoenas as issued shall be and hereby are modified in the following particulars, and he lists the particulars in which they are to be modified, and I understand that the subpoenas now before me conform with his modification which was decided and determined by Judge Mathes. You are familiar with that order, are you not?

Mr. Pickett: Yes, your Honor. It is part of our moving papers.

[fol. 81] Perhaps I have not made my point clear. If your Honor states, as I gather your Honor has already indicated, that you believe there is a sufficient showing by the demanding country of probable or good cause, I raise the

question whether that showing extends to burrowing into transactions with persons who are not even named or alleged to be co-conspirators in the second amended complaint.

The Court: I think you must follow what my conclusions are, what I am going to express. Number 1, I hold and I have concluded that the subpoenas are properly issued, that they must be complied with and attendance must be had before this court at which the defendant named, the alleged fugitive, may be present, if he desires, and may be represented by counsel. At that time he and his representatives alone will be heard to object solely on the ground of relevancy or materiality to the issues, and I hold that the plaintiffs at that hearing will have no right to appear or to object, but the defendant may. When objections are made by the defendant, we will then rule on them.

I have concluded, too, that, as far as due process is concerned, his deposition must be taken before a judge of this court, and it cannot be held in the absence of a judge of this court, or before a commissioner. It must be held by a judge, and a date will have to be set, and the hearing will have to be public. The defendant will have an opportunity to be present, to be represented by counsel, and to participate in the taking of the deposition to the extent that they may determine they should.

I think that these points you raised are matters that may well be raised by the defendant.

Mr. Pickett: You see, the position that your Honor's conclusion puts us in—

The Court: You mean the banks or the depositors?

Mr. Pickett: No, your Honor. I represent the depositor. The depositor will have no standing, I gather from what your Honor said, to object.

The Court: The depositor has no standing to object on the taking of this deposition, no more than an ordinary [fol. 82] witness will. Your opportunity exists only in this motion to quash. That having been determined, you are through.

Mr. Pickett: That is why I want to urge the point before your Honor now.

The Court: That is my view, and that will be my ruling.

Mr. Pickett: I understand. That is precisely why I want to make the point now.

The Court: The position of your clients are simply as witnesses, and once it is determined that they are properly before the court as witnesses, no witness is entitled to counsel.

Mr. Pickett: In view of that, the demanding country asks the witness, the representative of the bank, about transactions between the depositor and X, X not even being a person named in the second amended complaint.

The Court: At that point, if the defendant, the alleged fugitive, wants to enter an objection, he may do so, and it will be ruled upon by the court.

Mr. Pickett: Your Honor will not permit me to raise the point now?

The Court: Do you represent a depositor?

Mr. Pickett: That's right, your Honor.

The Court: No.

Mr. Pickett: Then may I raise the point at the present time?

The Court: No. I think that the scope of the taking of that deposition is a matter to be determined at the hearing and at the taking of the deposition. You have been heard to urge the ground that the subpoenas are issued without lawful authority for them, that they cover matters which are confidential in nature and that they are an unnecessary prying into your personal affairs, and I have concluded that each and every one of those objections should be overruled.

[Filed endorsement omitted]

[fol. 83]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M 8-85

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA to quash three subpoenas duces tecum dated March 15, 1960.

M 11-188

In the Matter of the Application of

NAPOLEON DUPOUY to quash two subpoenas duces tecum dated March 15, 1960.

M 8-85

In the Matter of the Application of

SILVIO GUTIERREZ to quash a subpoena duces tecum dated April 18, 1960.

OPINION OF JUDGE RYAN—May 13, 1960

(Appearances omitted.)

We have before us in this international extradition proceeding several motions, each addressed to the subpoenae duces tecum issued by this Court to four separate banking institutions transacting business in this District, commanding them to appear in this Court to give testimony and produce records of accounts maintained with them by the defendant and others. The testimony is sought for use in the United States District Court for the Southern Dis-

[fol. 84] trict of Florida, Miami Division, on a hearing to

be held on a complaint pending in that Court and filed pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), and the applicable extradition statute, 18 U. S. C. Section 3184, by respondent, Manuel Aristeguieta, Consul General of Venezuela in Miami, on behalf of his government, the Republic of Venezuela, against Marcos Perez Jimenez, a citizen of Venezuela charged with certain financial crimes (among others) in that country. The questions of law presented are common to all motions; we have considered them simultaneously.

Motions have been made by the banks and by two depositors whose accounts are the subject of the subpoenae. The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, all served within this District, have jointly moved in one motion to quash subpoenae served upon them. Napoleon Dupouy, a depositor of The First National City Bank of New York and of French American Banking Corporation, whose accounts with those banks are a subject of the subpoenae addressed to those banks, has separately moved to quash the subpoenae served upon these banks in so far as they concern the record of his accounts and transactions with the banks.

Chemical Bank New York Trust Company has not moved with reference to the subpoena served upon it; however, Silvio Gutierrez, a depositor whose account is a subject of the subpoena served upon that bank, has moved to quash the subpoena.

The subpoenae issued pursuant to *Rule 45(d) F. R. C. P.* and our jurisdiction to hear and determine these motions is granted by *Rule 45(b) F. R. C. P.* which gives the "Court . . . upon motion made . . . at or before the time specified . . . for compliance (authority) to quash or modify the subpoenae." Rule 45(d) is specifically made subject to Rule 45(b) when subpoenae duces tecum are in- [fol. 85] volved and there is no limitation in Rule 45(b) as to which Court may grant this relief. (Cf. *Shawmut, Inc.* v. *American Viscose Corp.*, 11 F. R. D. 562; *Underwood* v. *Maloney*, 15 F. R. D. 104.) The District Court in Florida expressly recognized the authority of this Court and in

effect directed that motions to quash be made returnable here. (Hearing of March 7, 1960, transcript p. 335)

All of the motions challenge the power or authority of this District Court to issue subpoenae duces tecum to compel the attendance of witnesses and the production of records in a hearing on a complaint filed in an international extradition proceeding. We hold this authority to be clear and unquestionable.

The subpoenae were issued and served under an order of the District Court for the Southern District of Florida, Miami Division, entered on March 9, 1960 upon motion of the Consul General granting to him permission to resort to the deposition procedure of Rules 26 and 45 and related provisions of the Federal Rules including procedure for subpoenae duces tecum. These subpoenae directed to the banks were originally made returnable on April 18, 1960; and an additional subpoena served on the Chemical Bank of New York, along with a notice to take its deposition, was made returnable on May 10, 1960.

Before this, The First National City Bank, French American Banking Corporation and The Royal Bank of Canada had been served with subpoenae duces tecum issued by the Clerk of this Court to appear for the taking of their depositions in New York. On November 12, 1959, The First National City Bank moved in the District Court of Florida for a protective order under *Rule 30(b), F. R. C. P.*, on the ground that the respondent Consul General had not complied with *Rule 15, F. R. Crim. P.* That motion was granted by a Judge of that Court, who by order of November 13, 1959, vacated the subpoena and notices on the ground that the Federal Criminal Rules should apply to [fol. 86] the proceeding. Later, upon petition of respondent, that Court vacated its order and entered a further order that the Court might provide for the taking of testimony by deposition and subpoena, which was premised upon the conclusion that the procedure for the examination of witnesses was not to be restricted by the Federal Rules, and that under the provisions of the Treaty the right to subpoena existed.

Following a hearing before Judge Mathes, the respondent, Consul General, filed a motion pursuant to Section

3184, Title 18, U. S. C., and under the Treaty for an order, in the nature of a subpoena, requiring the banks to appear and to produce in the Florida District Court the documents which had been sought by the prior subpoenae. The Court issued such an order and subpoenae were served by the Marshal of the District Court of Florida upon the banks here in New York.

On December 14, 1959, all the movants here moved to quash the subpoenae; the motion was denied but the subpoenae were modified in respects not here important. An appeal was taken by the banks and these two depositors (among others) from this order denying petitioners' motion, on the grounds that the Court had no power to issue subpoenae in an extradition proceeding and in any case no power to issue subpoenae to be served on persons residing beyond 100 miles from the Court's situs. The United States on this appeal filed a brief amicus curiae urging the Court's power to issue compulsory process in extradition proceedings. On February 1, 1960, the Court of Appeals for the Fifth Circuit (Chief Judge Rives, dissenting) concluded that the District Court's order should be vacated and the subpoena quashed.

On March 7, 1960, respondent, Consul General, moved to take depositions of these banks pursuant to subpoena duces tecum calling anew for the production of the documents as in the prior subpoenae. Judge Mathes held that the order of the Court of Appeals was limited to the question of the power of the District Court to issue subpoenae [fol. 87] returnable before it served on persons residing beyond 100 miles, and that under the Treaty and the extradition statute, unwilling witnesses could be compelled to give evidence within the territorial limitations provided by the Civil Rules. Judge Mathes granted the relief sought and specifically reserved to the Court in this District all matters concerning the scope of the subpoenae and depositions and even the question of a stay of the subpoenae. Judge Mathes made it clear that he was granting permission simply to secure and serve the subpoenae requested. The subpoenae have been issued by the Clerk of this Court.

We should also note that the banks and depositor Dupouy petitioned the Court of Appeals of the Fifth Circuit for a writ of prohibition or mandamus to vacate this order urging that Judge Mathes acted in contravention of the prior order of vacatur of the Court of Appeals. On March 25, 1960, the Court of Appeals denied the petition, stating that the propriety of the action of the District Court "was not before this Court nor decided by it and is not contrary to the mandate." Since that time the depositor Gutierrez, after an unsuccessful attempt in the District Court of Florida to quash the notice of deposition and subpoena duces tecum served on the Chemical Bank, has filed an appeal to the Court of Appeals in the Fifth Circuit.

On the motions now before this Court, the same objections as those urged in the Court of Appeals are again urged.

The final complaint filed herein alleges the commission by the defendant of crimes in Venezuela by a citizen of that country in violation of its penal laws. The complaint meets the statutory requirements of Section 3184, Title 18, United States Code, and charges the defendant with the commission of crimes for which extradition may be requested under the Extradition Treaty with Venezuela. The jurisdiction of the District Court in Florida to proceed under the provisions of Section 3184, Title 18, United [fol. 88] States Code, is not questioned on these motions. That Court has a proper complaint before it; the defendant has been found within its territorial jurisdiction and he has been apprehended and brought before it "to the end that the evidence of criminality may be heard and considered." The depositions sought to be taken on the return of the subpoenae now before us and the documents and records sought to be produced, the requesting Government represents, will be "evidence of criminality" it intends to submit in support of extradition and of its pending complaint.

Section 3184 provides that if the Judge before whom the alleged fugitive is brought, after hearing, "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty," he is to certify his finding, with the record, to the Secretary of State; thereupon, on

proper requisition, the Secretary of State may surrender the accused to the foreign government.

Article I of the Treaty with Venezuela provides that surrender of the alleged fugitive may be made "only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there." 43 Stat. 1698, 1699. Article XI of the Treaty provides that the evidence submitted at the hearing may include the depositions upon which the warrant of arrest issued and other competent evidence, and that the "judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested." 43 Stat. 1698, 1704.

The functions and duties of the District Judge before whom the complaint is pending and will be heard are somewhat comparable to those of a committing magistrate; he will not, of course, adjudge the guilt or innocence of the alleged fugitive of the crimes charged by the requesting country, but he, after hearing, shall act if "he deems the [fol. 89] evidence sufficient to sustain the charge under the provisions of the proper treaty or convention." (Section 3184) *Charlton* v. *Kelly*, 229 U. S. 447; *Orteiza y Cortes* v. *Jacobus*, 136 U. S. 330, 334-335.

The District Court here functions in a judicial capacity; he is charged with the making of a judicial determination. In accordance with our fundamental concepts of justice and of due process, he must hold public hearings; the accused must be given due notice of the hearings and be afforded full opportunity to be heard, with limitation only as to the issues presented for determination. Neither the District Judge, nor this Court which acts only in an ancillary capacity, is bound by either the federal criminal or civil rules when they are found to be in conflict with the terms of the treaty or of Section 3184.

There is no limitation or requirement in the statute or the Treaty that the other competent proof or evidence referred to in Article XI be in possession of respondent, Consul General, at the time of the filing of the complaint, or that it have been obtained by him in the demanding

country; and he is free to present other evidence available to him in the asylum state. It is certainly contemplated that the proof submitted on the hearing by a requesting sovereign, in addition to the documents and foreign underlying depositions, may well include the oral and written testimony of witnesses; for, again, there is no limitation.

We see, therefore, no justification for limiting respondent to the testimony of willing witnesses and precluding the obtaining of this same evidence when the witnesses are unwilling, or because of the inability of the hearing magistrate to compel appearance personally before him. Certainly the power to compel such attendance is explicitly assumed in Section 3191 on behalf of an indigent defendant. It can not be argued logically that it ceases to exist when it is the complainant who seeks to invoke it, or an accused with means. It follows that, if the Court has the power to order the testimony of witnesses within its reach, it can [fol. 90] order this same testimony when the witnesses are beyond its territorial reach. As the District Judge observed when granting the application to take these depositions, it would not be practical to so limit extradition hearings under Section 3184.

It is the asylum state which dictates the legal formalities to be complied with by the respondent. It does not make for justice to hold that the hands of the "judicial functionaries" are so tied while the burden of establishing probable cause to the satisfaction of the Judge is cast on respondent and, at the same time, that he is precluded from applying the ordinary procedures made available by the asylum state. Article XI.

Although the District Court gave respondent permission to invoke Rules 26 and 45, F. R. C. P., and related rules of discovery, it is clear from the record before it, from the affidavits submitted in support of the subpoenae and from the subpoenae themselves that respondent's right is limited to the presentation of relevant and material probative evidence in support of its charge of embezzlement and criminal malversation. Neither that Court nor this one holds that, in order to fulfill the statute and the Treaty, we are to accord respondent the limitless right of

sweeping discovery afforded our litigants by our civil rules in the hope of discovering evidence to support its complaint, or that the process of this Court may be used in this proceeding solely to investigate whether a crime charged was committed in a foreign country.

The materiality and relevancy of the evidence sought and its probable existence in the hands of the banks in question was demonstrated by the extradition documents, respondent's affidavit and the oral hearing before the District Court to the satisfaction of that Court which described it as evidence "to show that certain funds were taken out of the country, namely, the Republic of Venezuela, and brought to this country and channeled back to the defendant for his use and benefit."

[fol. 91] Just as an indigent accused's right to obtain and summon evidence and proof is circumscribed by Section 3191 in that he must show what he "expects to prove", the materiality of the evidence, and his need of it on the hearing (*Orteiza y Cortes* v. *Jacobus, supra*) so is the respondent's right limited. But it is clear that if a right exists on the part of an accused to explain ambiguities or doubtful elements in the prima facie case made against him and to have witnesses produced for the purpose of explaining matters referred to by the witnesses for the accuser (*Collins* v. *Loisel*, 259 U. S. 309; *United States* v. *Whitem*, Fed. Cases #16, 685, 28 Fed. Cas. 588), a concomitant right must exist on the part of the accuser to have witnesses for the purpose of explaining away ambiguities or doubts on the issues of the commission of the crime and the defendant's implication in it.

It is not for this Court or for movants to question whether in fact respondent has in his possession now more than sufficient proof to meet the requirements of probable cause, or whether he is in fact simply seeking to place on record additional evidence for ultimate use on the trial in Venezuela. He has not rested his case and the Court, which is to finally determine the weight and effectiveness of the respondent's evidence, has given him permission to gather this particular evidence for presentation in the extradition proceeding. That is a matter solely within the discretion of that Court, which in extradition hearings is

to be given wide latitude unhampered by formal rules. *Charlton* v. *Kelly, supra.*

A proper interpretation of our obligations under a covenant willingly entered into to assist another friendly nation in furthering the ends of justice, as conceived and adhered to by civilized nations, will fulfill the purpose and underlying philosophy of our Government and people to a greater extent than will a technical attitude whereby our assistance is grudgingly extended.

[fol. 92] We conclude that under Section 3191 of the Statute and Articles I and XI and on the record the District Court had the power to issue the subpoenae before us.

The motions to quash are, therefore, denied.

Extradition proceedings have been repeatedly compared with preliminary commitment proceedings. *Charlton* v. *Kelly supra; Benson* v. *McMahon,* 127 US 457 (1888); and have many of the indicia of a criminal proceeding. *Rice* v. *Ames*, 180 US 371; *Green* v. *Shine*, 187 US 181. We feel that defendant has a right to be present and represented by counsel at any public proceeding held by this Court. (Cf. *Rule 43 of the Rules of Criminal Procedure.*) Defendant has the permission of the Florida District Court to "go to the place, and be in attendance, at the taking of each such deposition" (Order of March 9, 1960).

Since both Rule 30(d) F. R. C. P. and Judges Mathes' order of March 9th empower this Court to limit and control the taking of these depositions and in order to facilitate and expedite these hearings, a Judge of this Court should preside at all hearings.

Therefore, the Consul General shall enter an order incorporating the procedure outlined above, scheduling dates acceptable to all parties and arranging hearings before us in a courtroom within this District.

Settle order on notice.

Dated: May 13th, 1960

Sylvester J. Ryan, U. S. D. J.

[fol. 93]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER DENYING MOTIONS TO QUASH SUBPOENAS —May 16, 1960

The Application of The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada to quash three subpoenas duces tecum dated March 15, 1960, having come on by motion to be heard before the Court on April 14, 1960; the Application of Napoleon Dupouy to quash the two subpoenas duces tecum dated March 15, 1960, directed to The First National City Bank of New York and French American Banking Corporation, having come on by Order to Show Cause to be heard before this Court on April 14, 1960, together with the Application by the three banks; by order of Chief Judge Ryan dated April 20, 1960, both Applications having been submitted on briefs and further argument continued to await directions of Chief Judge Ryan; the Application of Silvio Gutierrez, dated April 21, 1960, to quash a subpoena duces tecum dated April 18, 1960, directed to the Chemical Bank New York Trust Company having been assigned to Chief Judge Ryan for consideration with the aforementioned Applications and having been submitted on briefs; the deposition dated fixed in the subpoenas directed to The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada having been April 18, 1960 and by order of Chief Judge Ryan dated April 20, 1960, having been continued to May 10, 1960; the deposition date fixed in the subpoena directed to the Chemical Bank New York Trust Company having been May 10, 1960; on application of Silvio Gutierrez, the deposition of Chemical Bank New York Trust Company having been stayed by the Court, and the other depositions having been postponed by acquiescence of the parties, pending decision by the Court and entry of a final order in the above-
[fol. 94] entitled applications; and a further hearing herein having been held on May 13, 1960, counsel for all parties

making the above-entitled applications having been present, it is

Ordered that the above-entitled applications are denied for the reasons set forth in the opinion of the Court dated May 13, 1960;

Ordered that the time for taking the depositions of The First National City Bank of New York, French American Banking Corporation, The Royal Bank of Canada and Chemical Bank New York Trust Company by the officials designated in and pursuant to the aforesaid subpoenas duces tecum is hereby continued to June 22, 1960, on which day said banks shall appear at 10:00 A. M. in Room 129 at the United States Courthouse, Foley Square, New York, New York, prepared to give testimony and to produce the documents and things set forth in the schedule attached to the respective subpoenas served on them;

Ordered that a Judge of this Court shall preside over the taking of the aforesaid depositions and all hearings and proceedings in connection therewith;

Ordered that Marcos Perez Jimenez, the defendant in the extradition proceeding now before the Honorable Judge William C Mathes sitting by special assignment in the United States District Court for the Southern District of Florida, and his counsel are permitted to attend all of the aforesaid proceedings and depositions; and

Ordered that the application of counsel for all parties making the above-entitled applications for a stay of proceedings pursuant to the aforesaid subpoenas until an appeal is taken and/or during the pendency of any such appeal is hereby denied.

Dated: May 16, 1960

Sylvester J. Ryan, Chief Judge.

[File endorsement omitted]

[fol. 95] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. M8-85

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK,
FRENCH AMERICAN BANKING CORPORATION,

and

THE ROYAL BANK OF CANADA,

to quash three subpoenas duces tecum dated March 15, 1960.

NOTICE OF APPEAL OF THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA—Filed May 18, 1960

Take Notice that the above-named movants, The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, hereby appeal to the United States Court of Appeals for the Second Circuit from the order herein, dated May 16, 1960, denying their motion to quash three subpoenas duces tecum dated March 15, 1960 and for other relief; and movants appeal from each and every part of said order and from the whole thereof.

(Date, subscription and direction omitted.)

[fol. 96] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-11-188

In the Matter of the Application

of

NAPOLEON DUPOUY,

to quash two subpoenas duces tecum dated March 15, 1960.

NOTICE OF APPEAL OF NAPOLEON DUPOUY—Filed May 19, 1960

Sir:

Notice is hereby given that Napoleon Dupouy, the applicant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the "Order Denying Motion to Quash Subpoenas" entered herein on May 16, 1960, as relates to said applicant's application to quash two subpoenas duces tecum dated March 15, 1960, directed to The First National City Bank of New York and French American Banking Corporation.

(Date, subscription and direction omitted.)

[fol. 97]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 374, 375, 376—October Term, 1959.

Argued June 16, 1960

Docket Nos. 26325, 26326, 26327

Docket No. 26325

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners-Appellants,

to quash three subpoenas *duces tecum* dated March 15, 1960,

—against—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

Docket No. 26326

In the Matter of the Application of

SILVIO GUTIERREZ, Petitioner-Appellant,

to quash a subpoena *duces tecum* dated April 18, 1960,

—against—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

[fol. 98]

Docket No. 26327

In the Matter of the Application of

NAPOLEON DUPOUY, Petitioner-Appellant,

to quash two subpoenas *duces tecum* dated March 15, 1960,

—against—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent-Appellee.

Before: Waterman, Moore and Hamlin,* Circuit Judges.

Consolidated appeals from an order of Chief Judge Ryan, United States District Court, Southern District of New York, which denied appellants' motions to quash subpoenas *duces tecum* issued by the Clerk of the Court, United States District Court, Southern District of New York, under an order of Judge Mathes, United States District Judge, sitting by designation in the Southern District of Florida, granting appellee "permission to resort to the deposition procedures provided in Rule 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including without limitations, procedure for subpoenas *duces tecum*, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City."

Reversed.

[fol. 99] John A. Wilson, New York, N. Y. (Shearman & Sterling & Wright, New York, N. Y., on the brief; Gilson B. Gray, III, New York, N. Y., of Counsel), for Petitioner-Appellant, The First National City Bank of New York;

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* Of the Ninth Circuit, sitting by designation.

Coudert Brothers, New York, N. Y. (Alexis C. Coudert, New York, N. Y., of Counsel), for Petitioner-Appellant, French American Banking Corporation;

Sage Gray Todd & Sims, New York, N. Y. (Melber Chambers, New York, N. Y., of Counsel), for Petitioner-Appellant, The Royal Bank of Canada.

Benjamin Busch, New York, N. Y. (Katz & Sommerich, New York, N. Y., on the brief; Otto C. Sommerich and Albert M. Herrmann, New York, N. Y., of Counsel), for Petitioner-Appellant, Silvio Gutierrez.

Charles Pickett, New York, N. Y. (Chadbourne Parke Whiteside & Wolff, New York, N. Y., on the brief; Alan B. Lerner, New York, N. Y., of Counsel), for Petitioner-Appellant, Napoleon Dupouy.

David C. Acheson, Washington, D. C. (Dean Acheson, Howard C. Westwood, and Sidney S. Sachs, Washington, D. C., John Logan O'Donnell, New York, N. Y., on the brief; Covington & Burling, and Sachs and Jacobs, Washington, D. C., Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N. Y., of Counsel), for Respondent-Appellee, Manuel [fol. 100] Aristeguieta, Consul General of the Republic of Venezuela.

Malcolm Richard Wilkey, Assistant Attorney General, Beatrice Rosenberg, Joseph J. Cella, Jerome M. Feit, Attorneys, Department of Justice, Washington, D. C., on the brief for the United States, as Amicus Curiae.

OPINION—December 30, 1960

Moore, Circuit Judge:

The appellants are three banks, The First National City Bank of New York (City Bank), French American Bank-

ing Corporation (French American), the Royal Bank of Canada, and Silvio Gutierrez, a depositor with Chemical Bank New York Trust Company, and Napoleon Dupouy, a depositor in City Bank and French American. Appellants appeal from an order which denied appellants' motions to quash subpoenas *duces tecum* issued by the Clerk of the District Court for the Southern District of New York. Previously, United States District Court Judge Mathes of the Southern District of California, sitting as an extradition magistrate in the Southern District of Florida, had granted appellee "permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including, without limitations, procedure for subpoenas *duces tecum*, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City."

Involved is an international extradition proceeding initiated by Manuel Aristeguieta, Consul General of the Re- [fol. 101] public of Venezuela, on behalf of appellee, the Republic of Venezuela (Venezuela), in which the return to Venezuela of Marcos Perez Jimenez, a former president of Venezuela, now in the State of Florida, is sought. The complaint filed by Venezuela in the Southern District of Florida charges Jimenez with a number of crimes alleged to have been committed in Venezuela, which are extraditable under the Treaty of Extradition between the United States and Venezuela (43 Stat. 1698). The crimes include four murders, the unlawful abstraction and misappropriation to his own personal use of large sums of money and the illegal receipt of various commissions, all to his illicit enrichment at the expense of the Republic of Venezuela.

More specifically, the complaint in substance alleges that the Attorney-General of Venezuela filed a bill of charges supported by voluminous documentary evidence in the Federal Court of Venezuela, that the Federal Court issued its warrant for Jimenez' arrest, that extradition documents legally authenticated have been filed here and incorporated therein by reference and that justification for extradition has been established as a matter of fact and law. Hearings,

which have been conducted for some time before Judge Mathes, are still pending. During the course of the hearings, counsel for Venezuela served upon certain of the banks notices for taking depositions in New York together with subpoenas based thereon. The notices upon motion were vacated by order (Judge Choate) in Florida. This order in turn was vacated (also by Judge Choate) "in so far as it relates to the establishment of special rules governing procedure in the above styled case."

Thereafter, subpoenas were served in New York, returnable in Miami, Florida, requiring the banks to produce certain specified records. The banks responded by moving to quash; the motions were denied and thereafter an appeal [fol. 102] was taken by the banks and others (including appellant depositors) to the United States Court of Appeals for the Fifth Circuit. The appellants there argued that subpoenas in an extradition proceeding could not properly be issued on behalf of the demanding country and, alternatively, that the particular subpoenas were invalid because they purported to extend the Court's process beyond 100 miles from the Court House in Miami, see Fed. Rules Civ. Proc. 45(e)(1). The United States filed a brief *amicus curiae* (as has been done in this court), contending that the power of an extradition magistrate includes nationwide compulsory process.

In the interest of expedition the Court of Appeals for the Fifth Circuit handed down a *per curiam* opinion, Chief Judge Rives dissenting, in which the grounds of decision were not stated. The court simply concluded that the order of the District Court should be reversed and the subpoenas quashed. *Aristeguieta* v. *Jimenez*, 5 Cir., 1960, 274 F. 2d 206 (petition for certiorari docketed April 28, 1960). After complying with this mandate, Judge Mathes by order permitted Venezuela to avail itself of the deposition and subpoena procedure under the Federal Rules of Civil Procedure. Subpoenas have been issued in the Southern District of New York and the banks again have moved to quash. From Chief Judge Ryan's opinion denying the motions, appellants appeal.

The foundation for international extradition lies within a short statutory framework, 18 U. S. C. A. §§3184-3195,

and whatever treaty is applicable to the foreign country seeking delivery. The treaty with Venezuela, *supra* (a fairly standardized version of comparable agreements with other nations) provides that upon requisition a person charged with any of the crimes specified in Article II shall be surrendered by the country of asylum.

[fol. 103] The purpose of the Treaty is "to facilitate the course of punitive justice * * * ; to prevent the impunity which would result from the escape of guilty persons and of their asylum in the territory of one or the other nation," and to provide for the extradition of the accused as well as the sentenced. The method agreed upon was "to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person actually was within such jurisdiction when the crime was committed, and who shall seek asylum or who shall be found within the territories of the other." To assure each contracting country of comparable criminal standards the surrender was to be made "only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there" (Article I).

Section 3184, Title 18, United States Code, then empowers "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State" in whose jurisdiction the fugitive is found, to conduct (after apprehension and appearance) a hearing "to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty * * * he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State * * *."

Neither statutes nor decided cases furnish satisfactory guides as to procedures for obtaining proof upon extradi-
[fol. 104] tion proceedings. However, the courts have compared these proceedings with

> "preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him." (*Benson* v. *McMahon*, 127 U. S. 457, 463 (1888).)

Adhering to this analogy, the question, thus, is whether probable cause has been established to suppose the fugitive guilty, *Glucksman* v. *Henkel*, 221 U. S. 508, 512 (1911); cf. Rule 5(c) of the Federal Rules of Criminal Procedure, *i.e.*, a *prima facie* case, *Charlton* v. *Kelly*, 229 U. S. 447 (1913).

It was early recognized that upon an extradition hearing the evidence necessary to make out a *prima facie* case would be located in the country where the crime was committed and that the object of extradition would be defeated if the demanding country were put to the onerous task of transporting witnesses in person to the United States (*Bingham* v. *Bradley*, 241 U. S. 511, 517 (1916)). Hence, 18 United States Code §3190 permits "depositions, warrants, or other papers or copies thereof" offered by the demanding government to be admitted in evidence if properly authenticated and certified that such evidence would be admissible in a like proceeding in the demanding country. The *ex parte* advantages of Section 3190 are not open to a defendant (*In re Luis Oteiza y Cortés*, 136 U. S. 330 (1890)), but he may offer limited evidence, admissible under recognized standards, to explain elements in the case against him (*Charlton* v. *Kelly*, *supra*). Moreover, Section [fol. 105] 3191 provides, as to an indigent fugitive, where "there are witnesses whose evidence is material to his defense" and without whom "he cannot safely go to trial," the magistrate "may order that such witnesses be subpenaed" and the costs incurred and the fees of the witnesses "shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

Finally, if the magistrate finds the evidence insufficient, he may discharge the defendant although the demanding country may later institute a second proceeding (*Collins* v. *Loisel*, 262 U. S. 426 (1923)). If he finds probable cause established, he may bind over the defendant to the Secretary of State, who may, in his discretion, order the surrender (18 U. S. C. §3186).

First arises the question as to this court's appellate jurisdiction. Normally subpoena orders are interlocutory in nature and thus not appealable until the conclusion of the entire proceeding (*Cobbledick* v. *United States*, 309 U. S. 323 (1940)). However, the concept of finality is not inflexible. Because of the unicity of extradition, *viz.*, the magistrate's determination is not passed upon by an appellate court but only by the Secretary of State,[1] appellants' contentions will never be reviewed if not now. A non-party witness, of course, generally cannot take part in the ultimate appeal of any case (*Alexander* v. *United States*, 201 U. S. 117 (1906)), but at least the precedential effect of an adverse district court ruling may be arrested at that time. In any event, the self-contained character of extradition suffices to render orders refusing to quash subpoenas issued in aid of the demanding country analogous to those orders which are ancillary to an administrative [fol. 106] proceeding and therefore appealable.[2] See *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434 (1915).

The interrelated issues raised by the parties to this appeal may be summarized as follows:

(1) The banks contend that 18 U. S. C. §3190, which authorizes the admission in evidence of depositions and other papers certified abroad, is the exclusive evidentiary vehicle for the demanding country. They maintain that the basic principle and purpose of extradition presupposes

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[1] Limited collateral review, however, is available by way of habeas corpus, see *Fernandez* v. *Phillips*, 268 U. S. 311, 312 (1925), and most of the cases cited herein arose in that fashion.

[2] In holding the order of Judge Mathes denying the motion to quash the original subpoenas to be appealable, the Court of Appeals for the Fifth Circuit was unanimous.

that the demanding country must collect, in documentary form, all of its evidence at home and come to the country of asylum armed with a *prima facie* case. In support of the contrary position, Venezuela cites Article XI of the Treaty which provides for submitting to the asylum State the warrant of arrest in the country where the crime was committed and the depositions upon which such warrant may have been issued, "with such other evidence or proof as may be deemed competent in the case." Venezuela contends that this refers to evidence in addition to that which was acted on in the demanding country and includes evidence which may be found in the United States. A contrary interpretation, it is argued, would frustrate the purpose of the Treaty by encouraging fugitives to remove and conceal here evidence of culpability. As additional authority for this position are a number of cases where evidence obtained in the United States was admitted at the extradition hearing. See, e.g., *McNamara* v. *Henkel*, 226 U. S. 520 (1913); *Argento* v. *Horn*, 6 Cir., 1957, 241 F. 2d 258, cert. denied 355 U. S. 818; *In re Henrich*, C. C. S. D. N. Y., 1867, 11 Fed. Cas. 1143, No. 6,369. The opinions [fol. 107] in these cases, however, devote little discussion to the subject and the issue here raised has never been explicitly adjudicated.

(2) Conceding, in the alternative, that possibly witnesses in the United States may testify on behalf of the demanding country, the banks next argue that civil discovery cannot be availed of and that attendance cannot be compelled through use of a subpoena since there is nothing in the extradition treaties or statutes that would authorize the issuance of subpoenas at the behest of the demanding country. They assert that extradition is a nonjudicial proceeding conducted before a magistrate, and is not a proceeding within the jurisdiction of a United States District Court or of any Court. Thus, they claim, extradition is neither a "suit of a civil nature" to which the Federal Rules of Civil Procedure would apply, nor a judicial proceeding to which any inherent power of a court would attach. Venezuela, on the other hand, contends that an extradition hearing has many of the attributes of a judicial proceeding;

that the extradition magistrate thus has the usual powers of a judge; and that since the treaties and statutes do not spell out the procedural details of extradition, the magistrate may invoke his inherent power to provide himself with appropriate instruments required for the performance of his duties. In support of its position that subpoena power exists, Venezuela cites 18 U. S. C. §3191, which provides for payment of costs and fees of witnesses subpoenaed by indigent fugitives, and contends that this statute discloses a Congressional assumption that the power of subpoena at the behest of the demanding country resides in the extradition magistrate. The banks argue that this section, at most, permits the magistrate to subpoena only on behalf of the accused fugitive and clearly does not give the demanding country a similar privilege.

[fol. 108] (3) Appellants next urge that even if the extradition magistrate has the power to subpoena witnesses for the demanding country, he has no authority to authorize the demanding country to avail itself of the deposition-subpoena procedures provided for in the Federal Rules of Civil Procedure. Pointing out that the Federal Rules of Criminal Procedure are specifically declared to be inapplicable to extradition proceedings and that the Civil Rules should not be available in a quasi-criminal proceeding, appellants contend that in the absence of statute there is no power in the federal courts or judges to authorize the taking of depositions. In addition, appellants assert that the basic principle of extradition militates against permitting the demanding country to invoke the judicial processes of the United States in order to "discover" evidence to be used at home. Venezuela, although admitting in its brief that "the Rules [Civil Procedure] are not mandatory in extradition," nevertheless takes the position that "Within his discretion under Article XI the extradition judge may do what a district judge may normally do, when no particular procedure is prescribed for the case—he may follow as a model, in exercising his discretion, the pattern provided by the Federal Rules of Civil Procedure."

(4) Appellant Dupouy, while not joining completely in the position taken by the banks,[3] argues that, in any event, the information sought under the subpoenas is not necessary to Venezuela's case.

Venezuela would thus vest the extradition magistrate with some inherent power, including the right to borrow from the Civil Rules, to fill a procedural vacuum in the extradition treaties and statutes. The ultimate issues posed for adjudication are thus (a) whether the extradition [fol. 109] magistrate has the power to authorize the demanding country to use deposition-subpoena provisions as provided for in the Civil Rules, and (b) whether this case is appropriate for the exercise of such power.

Preliminarily, it may be noted that we are not called upon to approve of a situation where a court, in which the Federal Rules of Civil Procedure are not mandatory, has borrowed a relatively minor provision from these Rules. See *Union National Bank* v. *Lamb*, 337 U. S. 38 (1949), where the Supreme Court followed Rule 6 in computing the running of time for a filing of a petition for certiorari, and *Simon* v. *Commissioner of Internal Revenue*, 2 Cir., 1949, 176 F. 2d 230, where this court adopted Rule 6 to determine the timeliness of a petition to review a decision of the Tax Court. Nor are we faced with a situation where an extradition magistrate has filled in gaps in the extradition treaties and statutes by fashioning his own procedure in relation to minor and essentially collateral matters. See, for example, *In re Ludwig*, C. C. S. D. N. Y., 1887, 32 Fed. 774, which relates to continuances and adjournments, and *Wright* v. *Henkel*, 190 U. S. 40 (1903), which concerns the power to admit the fugitive to bail pending the hearing. Even a hasty glance at the complex and interrelated issues and arguments raised by the parties to this appeal clearly reveals that we are confronted with a basic procedural in-

[3] The other depositor-appellant, Gutierrez, joins in all the arguments. The standing of the depositors to challenge the subpoenas is not disputed.

novation having far reaching consequence in the field of international extradition.[4]

In this connection the recent Supreme Court decision of *Miner* v. *Atlass*, 363 U. S. 641 (1960), is significant. Holding invalid a District Court admiralty rule which authorized the taking of oral depositions for the purpose of discovery only, the Court stated:

> [fol. 110] "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U. S. C. §331 (advisory function of Judicial Conference), 28 U. S. C. §2073 (prior report of proposed rule to Congress), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U. S. C. §2073." 363 U. S. at 650.

The *Miner* case, of course, is not cited as authority that the procedural innovation sought to be used in this case is or is not within the rule-making power of the Supreme Court, or that the extradition magistrate may or may not be authorized to order the taking of depositions under any circumstances. Implicit in *Miner*, however, is the warning that federal courts must proceed with extreme caution when asked to sanction basic procedural innovations which lie in that misty land where judicial and legislative powers

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[4] The cases cited in the briefs and cases examined in independent research do not shed any authoritative light on the subject.

meet.[5] Moreover, when called upon to justify such innovations on the basis of inherent power, the courts should be doubly cautious that the exercise of this power is ap- [fol. 111] propriate to the particular case. Although neither the Treaty nor the statutes provide for the taking of depositions in the asylum country, Venezuela argues that "Certainly the extradition judge must be, and under the Treaty is, free to establish some method of proceeding." Such a principle would give to each individual judge unlimited power on an *ad hoc* basis to create whatever procedure he might choose. Procedural chaos could easily result. The Federal rules both criminal and civil were carefully drafted to avoid such a situation. In all likelihood the number of occasions for international extradition was not sufficiently large to justify the codification of procedural rules which should apply thereto. In a field as important from a national foreign policy point of view, it should not be the function of judges individually or collectively to write such a code. If there are to be "procedural innovations" of general application, they should come as suggested by the Supreme Court (336 U. S. 641, 650) "only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords." Until such time as a procedural code of general application in international extradition is written, we are convinced that any power in the extradition magistrate to create his own rules or procedures should be limited to situations where the exercise of that power is essential in the particular case. Thus, before deciding what, if any, power resides in the extradition magistrate to authorize depositions, it is necessary to determine what circumstances might justify the use of this supposed power, and whether these circumstances exist in the instant case.

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[5] For cases which indicate that in the absence of statute there exists no power to authorize pre-trial depositions, see *Hanks Dental Assn.* v. *International Tooth Crown Co.*, 194 U. S. 303 (1904); *Heister* v. *Lehigh & N. E. R. Co.*, 50 F. 2d 928 (D. C. S. D. N. Y., 1931); *Tobacco and Allied Stocks* v. *Transamerica Corp.*, 16 F. R. D. 545 (1954).

Even under the liberal provisions of the Civil Rules, certain courts have indicated that when a party seeks the production of documents under Rules 34 or 45, some showing of need is necessary after the proper objection [fol. 112] has been made.[6] The Federal Rules of Criminal Procedure, which, of course, are not directly applicable to extradition (see Rule 54(b)(5), but which are available for analogy purposes,[7] provide for the taking of depositions to be used at trial only when necessary "to prevent a failure of justice." Rule 15(a). As was stated by the Advisory Committee on the Rules:

> "Unlike the practice in civil cases in which depositions may be taken as a matter of right * * * it was contemplated that in criminal cases depositions would be used only in exceptional situations." Note to preceding Rule 15, 18 U. S. C. A.[8]

It is also not without significance that the United States Government, which in federal criminal prosecutions is in some respects in a position similar to the demanding country in an extradition proceeding, cannot avail itself of the deposition privilege made available to defendants by Criminal Rule 15. The unavailability of this procedure to federal prosecutors indicates that even if the demanding

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[6] Compare *Boeing Airplane Co.* v. *Coggeshall*, D. C. Cir., 1960, 280 F. 2d 654, with *Connecticut Mutual Life Insurance Co.*, D. C. S. D. N. Y., 1955, 17 F. R. D. 273.

[7] Extradition proceedings have been referred to by the Supreme Court as being of a criminal nature. See *Grin* v. *Shine*, 187 U. S. 181 (1902); *Rice* v. *Ames*, 180 U. S. 371 (1901).

[8] See also 18 U. S. C. A. §3191, which authorizes the extradition magistrate to subpoena witnesses for indigent fugitives when the fugitive cannot "safely go to trial without such evidence." In *Gallina* v. *Fraser*, D. C. Conn., 1959, 177 F. Supp. 856, aff'd 2 Cir., 1960, 278 F. 2d 77, cert. den. 364 U. S. 851, the Court, in holding that the extradition magistrate did not abuse his discretion in denying the fugitive's motion to subpoena witnesses pursuant to §3191, stated that the subpoena should be ordered in situations where "the evidence sought indicates that the person charged will be denied a fair hearing unless the witnesses are produced." *Id.* at p. 869.

country should not be denied the privilege absolutely, [fol. 113] nevertheless whatever deposition privilege may be granted to the demanding country should be exercisable only in exceptional situations where a strong showing of need is made.

Nor is the policy favoring and facilitating extradition (see *Factor* v. *Laubenheimer*, 290 U. S. 276 (1933); 1 Hyde, International Law §310 (1922); 48 Yale L. J. 701 (1939)) frustrated by so limiting whatever deposition-subpoena privilege that may exist. An examination of the extradition treaties, statutes, and decisions reveals that the procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation. First, 18 U. S. C. §3190, permits the demanding country to introduce properly authenticated and certified *ex parte* depositions, etc., gathered at home. Second, the *ex parte* advantages of §3190 are not available to the defendant, *In re Luis Oteiza y Cortes*, 136 U. S. 330 (1890). Third, the defenses available to the fugitive are extremely limited: he cannot, for example, introduce evidence which contradicts the demanding country's proof (*Collins* v. *Loisel*, 259 U. S. 309 (1922); *Charlton* v. *Kelly*, 229 U. S. 447 (1913)); evidence to establish alibi (*Desmond* v. *Eggers*, 9 Cir., 1927, 18 F. 2d 503, motion to stay execution denied, 274 U. S. 722; *In re Wadge*, 15 Fed. 864 (1883)); evidence of insanity (*Charlton* v. *Kelly*, 229 U. S. 447 (1913)); and evidence that the statute of limitation has run (*Hatfield* v. *Guay*, 1 Cir., 1937, 87 F. 2d 358, cert. denied 300 U. S. 678). Fourth, the actual guilt of the fugitive does not have to be established, but instead the demanding country need show only probable cause that he is guilty. *Benson* v. *McMahon*, *supra*. Thus, while liberal deposition procedures in civil litigation may be favored by the courts, it is obvious that because of these procedural advantages [fol. 114] the demanding country's need to invoke the judicial process of the United States to gather evidence of culpability would arise only in the extraordinary case. It would be a perverse doctrine indeed which would hold that where the peculiarities of a juridical area require extend-

ing to a party extraordinary remedies, necessarily other extraordinary remedies must be readily granted.

We thus turn to the crucial question in this case, namely, has Venezuela shown such exceptional circumstances as would justify the granting of the depositions it seeks. The complaint filed by Venezuela charges Jimenez *inter alia* with various financial crimes involving misappropriation of public funds in violation of various provisions of the Penal Code of Venezuela. The supporting documents, totalling approximately 2,000 pages, filed in the extradition hearing, include charges by the Attorney General of Venezuela, the finding of the highest court of that country that the charges and evidence establish cause for prosecution and arrest, the warrant of arrest of that court, and a substantial quantity of evidence submitted to that court.[9]

According to counsel for Venezuela, the evidence discloses that many of the illegal financial transactions charged were accomplished with the assistance of others using facilities of certain banks in the United States, including the banks involved in these appeals. Asserting that Jimenez has on deposit in United States banks about $4,400,000, Venezuela claims that these depositions will serve the following purpose:

> "Existing sources will trace to its illegal sources about $500,000 of these deposits. The record of the banks [fol. 115] to which the deposition subpoenas are directed will assist in tracing the balance to its sources, and there is every likelihood that these records will disclose significant additional deposits."

Although at the hearing below and at the proceedings in Miami it was determined that the evidence sought by the depositions was material and relevant, no determination has yet been made that this evidence is necessary to Venezuela's *prima facie* extradition case. The application to take depositions is directed towards the crime of "Em-

[9] Reserving the right to move to open at a later date, counsel for Venezuela told Judge Mathes it was resting on that record.

bezzlement or criminal malversation" and under Article II of the Treaty the amount embezzled to constitute an extraditable offense must exceed $200 (USA) or B.1,000 (Venezuela). Without further discovery, Venezuela already has existing sources which will trace about $500,000, an amount far in excess of the statutory requirement. Naturally, Venezuela would like to trace the balance of the alleged $4,400,000 which it believes may be on deposit in American banks. It also hopes that the depositions "will disclose significant additional deposits." However, the extradition hearing is not the occasion on which the accused's guilt is to be established with the certainty and finality as would be required upon the actual trial. Were this a proceeding in our courts for the discovery of assets, the relief granted might well be proper. But this is not such a proceeding. If, as Venezuela has indicated, it is willing to rest its case upon the record already made, the additional evidence sought would appear to be merely cumulative. Nor has any showing been made as to how $4,400,000 will exceed in legal effectiveness, insofar as meeting the statutory requirement of over $200 is concerned, the $500,000 already claimed by Venezuela. Since at this stage there is no present showing of need, it would be unwise in the absence of more specific statutory com- [fol. 116] mand or direction to sanction such broad deposition proceedings as are now sought.

The orders are reversed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result.

[fol. 117]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Oliver D. Hamlin, Circuit Judges.

In the Matter

of

the application of the FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Appellants.

JUDGMENT—December 30, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed, with costs to the appellants.

[fol. 118] [File endorsement omitted]

[fol. 119]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Oliver D. Hamlin, Circuit Judges.

In the Matter

of

the Application of

SILVIO GUTIERREZ, Appellant.

JUDGMENT—December 30, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed, with costs to the appellant.

[fol. 120] [File endorsement omitted]

[fol. 121]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Oliver D. Hamlin, Circuit Judges.

In the Matter

of

the Application of

NAPOLEON DUPUY, Appellant.

JUDGMENT—December 30, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed, with costs to the appellant.

[fol. 122] [File endorsement omitted]

[fol. 123] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 125]

SUPREME COURT OF THE UNITED STATES

No. 688, October Term, 1960

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, etc., Petitioner,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, et al.

ORDER ALLOWING CERTIORARI—March 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 77 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.